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92-723

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

PACIFIC EXPRESS, INC.,

Petitioner,

v.

UNITED AIR LINES, INC.,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of
Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

BLECHER & COLLINS, P. C.
MAXWELL M. BLECHER
611 West Sixth Street
Suite 2000
Los Angeles, California 90017
Telephone: (213) 622-4222

Attorneys for Petitioner
PACIFIC EXPRESS, INC.

Westside Law Publishers · Los Angeles, California 90025 · (310) 207-0272

QUESTIONS PRESENTED

The two questions presented by this petition for certiorari are:

1. Can antitrust injury flowing from unreasonably exclusionary conduct be established by proof that (a) entry into a market by a large, well established airline was retaliation against a smaller, vulnerable rival which rejected a plan to enter into a non-competition agreement with the larger competitor, and (b) such entry would produce long-run monopolization, even though the short-term effect of the entry was to stimulate competition?

2. If, as this Court ruled in *Eastman Kodak Co. v. Image Technical Services, Inc.*, ____ U.S. ____, 112 S. Ct. 2072 (1992), plaintiff's burden on summary judgment is to present evidence permitting a reasonable inference from

which a trier of fact could find a defendant's proffered legitimate business justification defense "pretextual," was summary judgment appropriate where (a) plaintiff presents substantial evidence of anticompetitive purpose; (b) defendant submits its legitimate justification defense through a conclusory statement in the reply brief supporting its summary judgment motion; and (c) defendant's justification was not supported by even a single contemporaneous document produced during the course of the litigation?

PARTIES AND RULE 29.1 STATEMENT

All parties to this proceeding appear on the caption of this petition.

Pursuant to Supreme Court Rule 29.1, the petitioner submits the following information:

Petitioner Pacific Express, Inc., is a subsidiary of Pacific Express Holding Company, Inc.

Respondent United Air Lines, Inc., is a wholly owned subsidiary of UAL, Inc.

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IN THE SUPREME COURT OF THE UNITED STATES

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PACIFIC EXPRESS, INC.,

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v.

UNITED AIR LINES, INC.,

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PETITION FOR WRIT OF CERTIORARI

Petitioner PACIFIC EXPRESS, INC., respectfully requests that a writ of certiorari be issued to review the judgment and decision of the Court of Appeals for the Ninth Circuit filed on March 25, 1992.

OPINION BELOW

The opinion of the Ninth Circuit is published at 959 F.2d 814 (9th Cir. 1992). It is reprinted in the appendix ("App.") at A-1-A-12.

JURISDICTIONAL STATEMENT

The Court of Appeals for the Ninth Circuit entered its judgment on March 25, 1992. The Ninth Circuit denied Pacific Express' timely petition for rehearing and suggestion for rehearing *en banc* on July 25, 1992. A copy of that

Order is reprinted at App. B-1. This Petition is filed within ninety (90) days of that Order. Jurisdiction of this Court is founded on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Sherman Act (15 U.S.C. § 2) provides in pertinent part:

> Every person who shall monopolize . . . any part of the trade or commerce among the several States . . . shall be deemed guilty . . . .

Section 4 of the Clayton Act (15 U.S.C. § 15) provides in pertinent part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained . . . .

STATEMENT OF THE CASE

A. Factual Overview

Petitioner Pacific Express, Inc. ("Pacific Express"), initiated service in 1982 as the first post-regulation airline to be certificated on the West Coast. As a nonunion, low-cost, all-jet fleet airline, it posed a serious competitive threat to respondent United Air Lines, Inc. ("United"), which had high labor costs and was experiencing substantial systemwide losses. (ER 106, Davis Decl. at 8; ER 106, Cobb Decl. at 25; ER 106, Roberts Decl. at 41.)

Pacific Express began operations by confronting United directly in one of its major markets, the Los

Angeles-San Francisco corridor. (ER 106, Davis Decl. at 8.) United responded by denying Pacific Express access to scarce gate space at San Francisco (ER 106, Cobb Decl. at 26-27; ER 106, Davis Decl. at 8-9) and terminal space in Medford, Oregon and Sacramento, California (ER 106, Davis Decl. at 5). Additionally, United used its computerized reservation system, Apollo, the dominant system in the Pacific Express/United territory, to impact Pacific Express adversely. These tactics included biased displays favoring United, poor and unreliable information concerning Pacific Express flights and charging Pacific Express an exorbitant booking fee. (ER 106, Davis Decl. at 9-11; ER 106, Cobb Decl. at 28-29.)

By late 1982, chastened by United's response and its inability to secure a toehold in the Los Angeles-San Francisco market, Pacific Express adopted a new strategy of serving the "unserved and underserved" markets out of San Francisco International Airport, many of which had been abandoned, in whole or material part, by the larger airlines after deregulation made entry into larger markets more inviting. (ER 106, Davis Decl. at 12-13; ER 106, Cobb Decl. at 28-29.) For example, United, after deregulation, stopped serving Stockton, Modesto, Visalia, Merced and Bakersfield, California. Air Cal and PSA, then two large intrastate airlines operating in California, abandoned many of their original intrastate routes, and Republic, then a large regional carrier, stopped serving Klamath Falls and Bend, Oregon and Redding, California. Finally, at least three commuter airlines (Golden West, Swift and Inland Empire), impacted by deregulation, ceased operations. (ER 106, Davis Decl. at 2-3, 6-7, 12.)

These unserved and underserved markets suited Pacific Express perfectly. Within months of introducing service into these markets, Pacific Express was exceeding passenger and revenue forecasts and, for the first time, in August 1983, produced a monthly profit in its 83 city-pair market route system. (ER 106, Davis Decl. at 12-13; ER 106, Cobb Decl. 29-30.) Moreover, in its new format, Pacific Express became the number one producer of connecting traffic for both United and TransWorld Airlines at the San Francisco International Airport. (ER 106, Davis Decl. at 13.)

In the Spring of 1983, while Pacific Express was in transition to its profit-making status, United initiated negotiations to effect a formal feeder arrangement between the two carriers at San Francisco International Airport under which Pacific Express would have operated flights from smaller cities into San Francisco to connect passengers on United flights. While Pacific Express saw this as an opportunity to eliminate its gate and Apollo problems, United entertained a totally different agenda. After securing from Pacific Express its most confidential plans consisting of new routes and anticipated schedules, United proposed it would enter into a feeder arrangement only if Pacific Express would agree not to compete head-to-head with United. In particular United sought to extract a promise that Pacific Express would never re-enter the Los Angeles-San Francisco market and would withdraw from serving cities capable of supporting two carriers, such as Boise, Idaho. When Pacific Express refused to agree to this non-competition agreement, United terminated the feeder negotiations. (ER 106, Davis Decl. at 13-5; ER 106, Cobb Decl. at 30.)

With lightning-like speed, a mere six weeks after terminating the negotiations, United announced its intention to introduce jet service into virtually every short-haul market then served by Pacific Express. (ER 106, Davis Decl. at 15; ER 106, Cobb Decl. at 31.) Remarkably, during discovery United failed to produce even a single contemporaneously prepared analysis assessing the costs or profitability of entering and re-entering these markets. More remarkable is the grant of summary judgment in this case, predicated solely (or, at a minimum, dominantly) on the declaration of Judy Bishop, a Regional Manager for Passenger Sales, at United's headquarters outside of Chicago, submitted in the *reply* memorandum in support of United's summary judgment motion. That declaration, which purports to set forth United's legitimate business justification defense is utterly lacking in concrete particulars and contains nothing but ambiguous speculation and self-serving conclusions, and is reprinted at App. C-1-C-7. (*See also* ER 111; ER 134.)

United's sweeping re-entry into previously abandoned markets was made while it was incurring significant systemwide losses. (ER 106, Roberts Decl. at 41.) Other facts evidence unusual and anticompetitive behavior. United actually increased service on certain routes in September 1983, a time of the year, after the peak summer months, when schedules are traditionally reduced. Moreover, when United resumed service in the Pacific Express markets, it carefully skimmed off Pacific Express' passengers by either sandwiching the Pacific Express flight between two United flights or meeting Pacific Express' exact departure time. (ER 106, Cobb Decl. at 31-32; ER 106, Davis Decl. at 15-17.)

By February 1984, United had bled Pacific Express to death. (ER 106, Roberts Decl. at 39.) Moreover, the activities of United dried up Pacific Express' ongoing efforts to raise external financing. (ER 106, Cobb Decl. at 9.)

Content that it had destroyed a serious potential and actual rival, United now sought to minimize its losses. Four months after Pacific Express stopped flying, United began to negotiate its withdrawal from the unprofitable markets it entered. It then commenced new negotiations for a feeder agreement, this time with a turbo-prop commuter airline called Westair, which was not positioned to compete with United. (ER 106, Davis Decl. at 16-17; ER 118 at 2-3; ER 106, Cobb Decl. at 33.) Subsequently, those carriers did in fact enter into a feeder agreement which set joint fares and precluded Westair from flying new routes without United's approval. (ER 106, Westair Agreement at 273; ER 106, Zielinski Depo. at 260:1-6.)

The record reflects the anticompetitive effect of United's conduct in eliminating Pacific Express. Six years after Pacific Express stopped flying, in August 1990 when the summary judgment motion was being briefed, United and its puppet Westair, faced *NO* competition in 13 city-pair routes in and out of San Francisco International Airport. (ER 106, Roberts Decl. at 44.) Moreover, United/Westair had significant market power in six other San Francisco city-pair markets. Pacific Express' economic expert, in a declaration supporting the opposition to the summary judgment motion, opined that after Pacific Express exited, United/Westair were able to and did actually increase fares in those markets. (ER 106, Koehn Decl. at 231.)

B. Proceedings Below

On October 1, 1990, the district court granted summary judgment for United on Pacific Express' Section 2 claim holding that plaintiff could not establish, as a matter of law, injury flowing from a reduction in competition because United's entry, even if for an anticompetitive purpose, increased competition and was, therefore, procompetitive. At that time, the district court denied United's companion motion for summary judgment as to plaintiff's state law claim of tortious interference. United then filed a second motion for summary judgment as to the state law claim which was granted on January 16, 1991. On appeal, the Court of Appeals for the Ninth Circuit affirmed the summary judgment in favor of United on both counts. App. A-9-A-12.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Is in Conflict with This Court's Decision in *Kodak*

The Ninth Circuit decision which, incredibly, suggests that conspiring with a competitor is an appropriate way in which to survive and prosper (App. A-9) is an insult to the competitive spirit embraced in the antitrust laws. The Court's cavalier adoption of United's proffered business justification in the face of strong, contrary evidence is an extremely egregious decision which, if allowed to stand, would eviscerate this Court's summary judgment analysis in *Eastman Kodak Co. v. Image Technical Servic-*

es, Inc., ___ U.S. ___, 112 S. Ct. 2072 (1992).[1] There, as in this case, "[l]iability turns, then, on whether 'valid business reasons' can explain [respondent's] actions." *Id.* at 2091 (citation omitted). There, as here, "[f]actual questions exist . . . about the validity and sufficiency of each claimed justification, making summary judgment inappropriate." *Id.* Where, as here, there is abundant evidence "'from which a reasonable trier of fact could conclude that [respondent's] . . . [business] reason is pretextual'" (*id.* (citation omitted)), then summary judgment must be denied even though at trial the antitrust defendant might win. Courts are not permitted to dispose of factually complex antitrust issues "as a matter of law on a record this sparse." *Id.* at 2092.

The record presented in *Kodak* is gigantic compared to this one. If summary judgment can be granted on the dispositive issue of legitimate business justification in a case challenging a monopolist's alleged predatory conduct solely on the basis of a conclusory four-page declaration supporting a *reply* brief where there is not a single contemporaneous business document produced to support those conclusions, then NO case under Section 2 of the Sherman Act is likely to survive summary judgment. This case cries for at least a *per curiam* reversal and remand for trial.

The primary danger to private antitrust enforcement is the overbroad use of summary judgment. This Court must ensure the integrity of that procedure. This decision

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[1] Although the Ninth Circuit's decision predates *Kodak*, that case was called to the Ninth Circuit's attention in connection with Pacific Express' petition for rehearing (App. D-1-D-68) and rejected by the court (*see* App. E-1).

of the Ninth Circuit denigrates the process by elevating the Court of Appeals to the function of fact finder. In concluding that plaintiff had not established antitrust injury, the court, in reality, finds no antitrust violation, because it accepts, contrary to every established rule of procedure governing summary judgment, United's proffered business justification defense. That defense was tendered only in the declaration of Judy Bishop *in the reply brief and was not supported by even one document prepared contemporaneously with the events in question.*

Summary judgment has now become the rule in antitrust cases. The lower courts have read the 1986 trilogy of decisions: *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), as a "green light" for granting summary judgment. Now the grant of summary judgment in antitrust litigation runs rampant. We do not suggest that with changes both in substantive and procedural antitrust law and given the press of massive criminal dockets, summary judgment should be repudiated or even disapproved. Rather, it must be confined to its limited role.

There are many antitrust cases which may be appropriately disposed of by summary judgment. But this is not such a case. Refusal to review this case -- even by *per curiam* or summary disposition -- will not only produce an enormous injustice, it will encourage continued disregard of the holding in *Kodak* that, if factually disputed, legitimate business justification is a jury issue.

Because it is apparent that there is a justiciable controversy requiring trial and because this case presents a typical fact pattern in which summary judgment is all too

frequently granted, as in *Kodak*, this case presents an important issue in the procedures affecting private antitrust enforcement.

B. Market Entry Can, Like Low Pricing, Be Predatory, When It Retaliates Against a Smaller, More Vulnerable Competitor Which Refused to Agree Not to Compete

To the extent that the Ninth Circuit opinion implies that entry cannot be predatory in any circumstance, then it has made a major error of substantive antitrust analysis which threatens to have serious practical and legal ramifications.

Entry, normally competitive, like low pricing which is also normally competitive, can become predatory if its tendency is to eliminate competition and thereby enhance a firm's long-term ability to reap the benefits of monopoly power. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982); *Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 769 F.2d 324 (6th Cir. 1985).

Here, United tendered to Pacific Express an agreement to form a cartel. Had Pacific Express agreed, it would have violated the conspiracy to restrain trade or the conspiracy to monopolize provisions of Sections 1 and 2 of the Sherman Act, or both. *See United States v. American Airlines, Inc.*, 743 F.2d 1114 (5th Cir. 1984), *cert. dismissed*, 474 U.S. 1001 (1985). The Ninth Circuit suggestion that had Pacific Express accepted United's tender to form a cartel, it would have "survived and prospered" (App. A-9) is one of the grossest insults to the principles

embodied in the antitrust laws ever expressed by a court in the United States. That statement alone warrants at least *per curiam* reversal. This Court should not tolerate for a moment the suggestion that a large competitor which has the ability to destroy its smaller, more vulnerable rival may exercise its power if the smaller, more vulnerable rival elects to reject a non-competition agreement and instead, in "red blooded American fashion," elects to compete.

This Court cannot let stand a decision which promotes non-competition agreements among competitors as the means by which a smaller, vulnerable competitor may survive and prosper. Surely, that concept chills the competitive process and encourages conspiracy, not competition. In short, according to the Ninth Circuit, Pacific Express had its chance to survive and prosper by knuckling under to United's demand that it not compete against it, and should not now complain because United then destroyed it for refusing to agree. Incredible!

For these reasons, this Court should grant certiorari.

CONCLUSION

For the reasons set forth herein, we respectfully urge that the Court grant certiorari in this case. The decision is not only an evisceration of the rule governing summary judgment in a Section 2 Sherman Act case enunciated in *Kodak*, but is a threat to the very principles of antitrust enforcement.

Dated: October 23, 1992

Respectfully submitted,

BLECHER & COLLINS, P.C.
MAXWELL M. BLECHER
611 West Sixth Street
Suite 2000
Los Angeles, California 90017
Telephone: (213) 622-4222

Attorneys for Petitioner
PACIFIC EXPRESS, INC.

APPENDICES

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PACIFIC EXPRESS, INC.,
Plaintiff-Appellant,
v.
UNITED AIRLINES, INC.,
Defendant-Appellee.

No. 91-55208
D.C. No.
CV-84-5185-ER
OPINION

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Argued and Submitted
February 6, 1992—Pasadena, California

Filed March 25, 1992

Before: Arthur L. Alarcon, Robert R. Beezer and
Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Alarcon

SUMMARY

Antitrust/Torts

The court of appeals affirmed a district court grant of summary judgment for defendants, holding that facts offered to support claims alleging antitrust violations and tortious interference with prospective economic advantage did not show that the defendant's efforts to compete were more than legitimate competitive behavior.

Appellant Pacific Express, Inc. began operating as an airline in 1982, serving routes connecting western cities with San Francisco and Los Angeles. In 1983, shortly after Pacific had begun to show a profit, appellee United Airlines, Inc. expanded its service in Pacific Express' service area. Pacific Express filed for bankruptcy protection in 1984. Pacific sued United, contending that United monopolized, or attempted to monopolize, airline routes in violation of the Sherman Act and that United's conduct tortiously interfered with Pacific's prospective economic advantage. The district court granted summary judgment in favor of United on each claim.

[1] To state a claim under § 2 of the Sherman Act, a plaintiff must prove possession of monopoly power in the relevant market, willful acquisition or maintenance of that power, and causal antitrust injury. [2] Even assuming that an inference of anti-competitive intent can be drawn from the facts presented by Pacific, those facts do not demonstrate that United's expansion of services to compete with Pacific was predatory or anticompetitive conduct. Directive evidence of intent to vanquish a rival in an honest competitive struggle cannot help to establish an antitrust violation. [3] Pacific did not show that its losses were caused by anything other than increased competition.

[4] In asserting its claim for tortious interference with prospective economic advantage, Pacific contended United's predominant motive in dealing with Pacific was to eliminate it as a competitor. [5] The correct standard, in California, for determining whether a competitor's actions are priviliged is whether the competitor's purpose is at least in part to advance his interest in competing with the other. [6] Since Pacific did not contradict United's evidence that its motive in expanding its service, at least in part, involved a genuine competitive purpose, no genuine issue of material fact existed regarding the defense of competitor's privilege.

COUNSEL

Maxwell M. Blecher, Blecher & Collins, Los Angeles, California, for the plaintiff-appellant.

S. William Livingston, Covington & Burling, Washington, D.C., for the defendant-appellee.

OPINION

ALARCON, Circuit Judge:

In this action, Pacific Express, Inc. (Pacific Express) alleges that United Airlines, Inc. (United) monopolized, or attempted to monopolize, various airline routes in the western part of the United States, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, and that its conduct tortiously interfered with Pacific Express' prospective economic advantage, contrary to California law. The district court granted summary judgment in favor of United Airlines on each claim.

Pacific Express began operating as an airline on January 27, 1982. At the outset, it concentrated on the route between Los Angeles and San Francisco. After sustaining losses in this market, Pacific Express restructured its business to serve routes connecting western cities with San Francisco and Los Angeles. In the spring of 1983, United entered into negotiations with Pacific Express to provide it with passengers from the western region of the United States so that United could concentrate on its longer routes. These negotiations were terminated in June of that year.

In the summer months of 1983, Pacific Express began showing a profit. On July 27, 1983, United announced that it would expand its service to cities in the western region of the United States which were previously served solely by Pacific

Express. United also increased its service on routes where it had previously competed with Pacific Express. By early 1984, Pacific Express was unable to continue business operations. Pacific Express sought protection under Chapter 11 of the Bankruptcy Act on February 4, 1984.

On May 1, 1984, United entered into an agreement with Westair to provide passengers for United's longer flights by serving some of the routes previously maintained by Pacific Express.

Pacific Express argues that reversal of the order granting summary judgment is compelled because genuine issues of material fact exist regarding whether United's expansion of its service had an anti-competitive effect and interfered with Pacific Express' prospective economic advantage.

We affirm because we conclude that Pacific Express failed to present facts showing that its injury resulted from anticompetitive conduct, or that United's sole purpose in expanding its service was anticompetitive. We discuss each of Pacific Express' contentions and the facts pertinent thereto under separate headings.

DISCUSSION

I. Antitrust Injury

Pacific Express contends that summary judgment was improperly granted because the facts in this record support a reasonable inference that United's *purpose* in expanding its service was to reduce competition and that its *conduct* was exclusionary or predatory. We review a grant of summary judgment *de novo*. *In re Bullion Reserve of N. Am.*, 922 F.2d 544, 546 (9th Cir. 1991). In reviewing an order granting summary judgment, we must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the

district court correctly applied the relevant substantive law. *Id.* at 546. The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "[T]here is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find . . . . that the plaintiff proved his case by the quality and quantity of evidence required by the governing law." *Id.* at 254. In *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the Supreme Court noted, in the context of a Section 1 violation, that "antitrust law limits the range of permissible inferences from ambiguous evidence." *Id.* at 588. In ruling on a motion for summary judgment, the court must apply "the substantive evidentiary standard of proof that would apply at the trial on the merits." *Anderson*, 477 U.S. at 252. The plaintiff bears the burden of proving a Section 2 claim by a preponderance of the evidence. *Shoppin' Bag of Pueblo, Inc. v. Dillon Companies, Inc.*, 783 F.2d 159, 161 (10th Cir. 1986); *Deauville Corp. v. Federated Dep't Stores, Inc.*, 756 F.2d 1183, 1188 (5th Cir. 1985).

[1] In order to state a claim for monopolization under Section 2 of the Sherman Act, a plaintiff must prove:

(1) Possession of monopoly power in the relevant market;

(2) willful acquisition or maintenance of that power; and

(3) causal antitrust injury.

Movie 1 & 2 v. United Artists Communications' Inc., 909 F.2d 1245, 1254 (9th Cir. 1990), *cert. denied*, —U.S.—, 111 S. Ct. 2852 (1991).

The following facts must be proved to establish an attempt to monopolize claim:

(1) specific intent to control prices or destroy competition;

(2) predatory or anticompetitive conduct to accomplish the monopolization;

(3) dangerous probability of success; and

(4) causal antitrust injury.

Id. at 1254.

To support its contention that its expansion of service did not constitute predatory conduct, United offered the declaration of Judy Bishop, United's Regional Manager for Passenger Sales. Bishop declared that United's expansion of service was preceded by extensive planning that began before the airlines began negotiations concerning a possible feeder arrangement. Bishop further stated that United expected that the expanded service would produce more passengers to connect with existing San Francisco flights.

United also introduced the declaration of Gary Dorman, a consulting economist. Dorman testified that United continued to serve the western region routes for at least four years after it expanded its services in 1983. During the time that Pacific Express and United were competing on the same routes, Pacific Express' fares were lower than those charged by United.

Pacific Express relies on the following circumstances to support its claim that United's purpose in expanding its service was anticompetitive. Pacific Express presented evidence that United made it difficult and costly for automated travel agencies who used United's computerized reservations system to find and book Pacific Express' competing flights. Pacific Express also introduced evidence that during this same period United prevented Pacific Express from gaining access to gates

at the San Francisco Airport. These events occurred prior to the date United expanded its service to compete with Pacific Express in cities outside the Los Angeles-San Francisco corridor.

Pacific Express also introduced the declaration of Frederick Davis, Pacific Express' marketing vice-president. Davis stated that Bill Andres of United told him that United was concerned that Pacific Express and United "would get into each other's pockets." Pacific Express also cites portions of the deposition of Donald C. Moonjian, a United employee who participated in the failed negotiations with Pacific Express, in an attempt to prove United's anticompetitive intent. Moonjian testified that United "did not ask Pacific Express to serve Los Angeles to San Francisco." He further stated that he did not "think we would have wished them to do so because we fly [the Los Angeles to San Francisco route], nor would we wish anyone else to fly [that route]. We would like to have [that route] all to ourselves."

[2] Even assuming that an inference of anti-competitive intent can be drawn from these facts, they do not demonstrate that United's expansion of its service to compete with Pacific Express was predatory or anticompetitive conduct. "Direct evidence of intent to vanquish a rival in an honest competitive struggle cannot help to establish an antitrust violation." *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 668 F.2d 1014, 1028 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982); *See Universal Analytics, Inc. v. MacNeal-Schwendler Corp.*, 914 F.2d 1256, 1259 (9th Cir. 1990) (even assuming that a secondary motivation of hiring a competitor's employee was to "wound" the competitor, no genuine issue of material fact existed with regards to predatory conduct because legitimate business reasons for the hiring existed).

In order to demonstrate that it suffered an antitrust injury, Pacific Express must show that its injury was caused by anti-

competitive or predatory aspects of United's conduct, not by competition. In *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990), the Supreme Court held that a private plaintiff seeking to recover damages under Section 4 of the Clayton Act must prove the existence of an injury "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id.* at 334 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). The injury must be "attributable to an anti-competitive aspect of the practice under scrutiny, 'since "[i]t is inimical to [the antitrust] laws to award damages" for losses stemming from continued competition.' " *Id.* (quoting *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109-10 (1986)). "The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior." *Id.* at 344 (emphasis in original).

In *Atlantic Richfield*, the Supreme Court rejected the notion that the antitrust injury requirement can be satisfied by a showing that the long-term effect of the allegedly violative conduct would ultimately reduce competition. *Id.* at 337 n.7. "Rivals cannot be excluded in the long run by a nonpredatory maximum-price scheme unless they are relatively inefficient. Even if that were false, however, a firm cannot claim antitrust injury from nonpredatory price competition on the asserted ground that it is 'ruinous.' " *Id.* (citations omitted). The Court pointed out that the purpose of the antitrust laws is "the protection of *competition*, not *competitors*." *Id.* at 338 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis in original)).

A defendant's behavior may fairly be characterized as predatory when the defendant is "attempting to exclude rivals on some basis other than efficiency." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (citations omitted). United's attempts to induce Pacific Express to serve routes not flown by United in order to provide United's long

distance flights with passengers does not establish predatory or anticompetitive conduct. If the negotiations had not failed, Pacific Express may have survived and prospered. Likewise, proof that United entered into an agreement with Westair to fly routes previously flown by Pacific Express, after Pacific Express ceased operating, does not demonstrate anticompetitive conduct that injured Pacific Express.[1]

[3] In sum, Pacific Express has not shown that its losses were caused by anything other than increased competition. Undoubtedly, the entry of United, a large, well-known carrier, into Pacific Express' markets injured Pacific Express' business opportunities. However, Pacific Express can only recover if its loss "stems from a competition-*reducing* aspect or effect of the defendant's behavior." *Atlantic Richfield*, 495 U.S. at 344 (emphasis in original). The Sherman Act was "not designed, and has never been interpreted, to reach all business practices, unfair or otherwise, damaging to individual companies." *Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1374 (9th Cir. 1983). Because Pacific Express has failed to demonstrate an antitrust injury, we must affirm the summary judgment in favor of United on this claim.

B. Tortious Interference with Prospective Economic Advantage.

[4] Pacific Express asserts that genuine issues of material fact exist regarding whether United interfered with Pacific Express' prospective economic advantage under California law. Pacific Express contends that the evidence, when viewed in the light most favorable to it, shows that United's predominant motive in dealing with Pacific Express was to eliminate

[1]For example, Pacific Express did not show that United offered predatory prices on its expanded service. In fact, the evidence shows that United's prices were higher than Pacific Express in the markets in which they competed.

it as a competitor. Under California law, a competitor is not liable for the tort of interference with prospective business advantage if the competitor can show that:

> (a) the relation concerns a matter involved in the competition between the actor and the other and
>
> (b) the actor does not employ wrongful means and
>
> (c) his action does not create or continue an unlawful restraint of trade and
>
> (d) his purpose is at least in part to advance his interest in competing with the other.

A-Mark Coin Co. v. General Mills, Inc., 148 Cal. App. 3d 312, 323, 195 Cal. Rptr. 859, 867 (1983) (quoting Restatement (Second) of Torts § 768).

At the hearing on the motion for summary judgment, the district court commented that the existence of the first three elements raised "no real dispute." This assertion was not disputed by Pacific Express at the hearing.

Pacific Express argues for the first time in this appeal that United employed improper means when it used confidential information provided to it by Pacific Express during their unsuccessful negotiations. Generally, we decline to hear issues which were not raised before the district court unless exceptional circumstances exist. *In re: Professional Investment Properties of America*, No. 90-35175, Slip op. 957,961 (9th Cir. Jan. 30, 1992). This circuit has recognized that an exceptional circumstance may exist where the newly raised issue is a purely legal one which either does not depend on the factual record developed below or the pertinent record has been fully developed. *Id.*

Whether United used confidential information wrongfully is a highly fact-specific question. Since United did not have

the opportunity to present any evidence to demonstrate that it did not use confidential information improperly because no factual dispute on this question was asserted before the district court, we decline to consider this issue.

The only issue raised during the summary judgment proceedings regarding this claim was whether United had a genuine intent to compete when it expanded its service on routes served by Pacific Express. Although Pacific Express has offered evidence that United's motives were not *solely* competitive, it did not contradict United's proof that its purpose was, at least in part, competitive. Judy Bishop, United's Regional Manager for Passenger Sales, stated in her declaration that United anticipated that the expansion would "generate substantial new connecting traffic for other San Francisco routes." Moreover, she declared that United expanded its operations at its San Francisco hub with "the full expectation that the [expanded] routes would make a positive contribution to profitability." Pacific Express has failed to demonstrate that United's only purpose in increasing its service was to drive Pacific Express out of business.

Pacific Express contends that California decisions have not found the actions of a competitor to be privileged if the plaintiff demonstrates that the *predominant* motive of the defendant was improper. Pacific Express mistakenly relies upon *Hamro v. Shell Oil Co.*, 674 F.2d 784 (9th Cir. 1982) to support its argument. However, *Hamro* and the California cases cited therein involved actions for interference with prospective economic advantage against "person[s] seeking to influence the conduct of a business in which he or she has a financial interest." *Id.* at 789. *Hamro* did not involve the defense of competitor's privilege.

[5] In *A-Mark*, the California Court of Appeal set forth the correct standard to determine whether a competitor's actions are privileged. 148 Cal. App. 3d at 323, 195 Cal. Rptr. at 867. The court in *A-Mark* held that a person who asserts the com-

petitor privilege defense must demonstrate that his "purpose is *at least in part* to advance his interest in competing with the other." *Id.* (emphasis added). The court in *A-Mark* explained its ruling as follows:

> The policy of the common law has always been in favor of free competition, which proverbially is the life of trade. So long as the plaintiff's contractual relations are merely contemplated or potential, it is considered to be in the interest of the public that any competitor should be free to divert them to himself by all fair and reasonable means. . . . In short, it is no tort to beat a business rival to prospective customers. Thus, in the absence of prohibition by statute, illegitimate means, or some other unlawful element, a defendant seeking to increase his own business may cut rates or prices, allow discounts or rebates, enter into secret negotiations behind the plaintiff's back, refuse to deal with him or threaten to discharge employees who do, or even refuse to deal with third parties unless they cease dealing with the plaintiff, all without incurring liability.

Id. at 323-24, 195 Cal. Rptr. at 867 (quoting Prosser, *The Law of Torts* § 130 (4th ed. 1971).

[6] Since Pacific Express has not contradicted United's evidence that its motive in expanding its service, at least in part, involved a genuine competitive purpose, no genuine issue of material fact exists regarding the defense of competitor's privilege. We are persuaded from an independent review of the record that no genuine issue of material fact exists regarding the defense of competitor's privilege.

AFFIRMED.

APPENDIX B

FILED
JUL 27 1992

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PACIFIC EXPRESS, INC., Plaintiff-Appellant, v. UNITED AIRLINES, INC., Defendant-Appellee.	No. 91-55208 D.C. No. CV-84-5185-ER ORDER

Before: ALARCON, BEEZER, and RYMER, Circuit Judges

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

ROBERTS B. OWEN
S. WILLIAM LIVINGSTON, JR.
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

ROBERT B. FLAIG
THELEN, MARRIN, JOHNSON & BRIDGES
333 South Grand Avenue, Suite 3400
Los Angeles, California 90071
(213) 621-9800

Attorneys for Defendant
United Air Lines, Inc.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PACIFIC EXPRESS, INC. and PACIFIC EXPRESS HOLDING, INC. Plaintiffs, vs. UNITED AIR LINES, INC., Defendant.	CASE NO. CV-84-5185-ER (Mcx) DECLARATION OF STEPHEN E. ENSBERG IN SUPPORT OF FILING A COPY OF DECLARATION OF JUDY BISHOP IN SUPPORT OF REPLY

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

HEARING DATE: SEPT. 10, 1990
BEFORE: JUDGE EDWARD RAFEEDIE
TIME: 2:00 p.m.

DECLARATION OF STEPHEN E. ENSBERG

I, STEPHEN E. ENSBERG, declare:

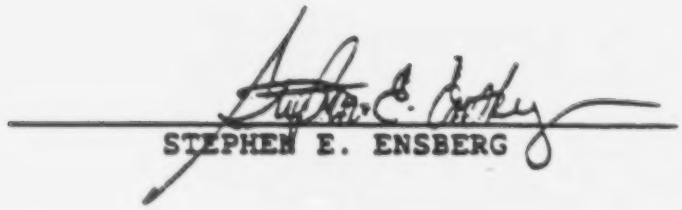
1. I am an attorney duly licensed to practice before this Court and all Courts of the State of California and am a partner with the law firm of Thelen, Marrin, Johnson & Bridges, local counsel for United Air Lines, Inc., defendant herein. In my capacity as such I have gained personal knowledge of the facts set forth below and could and would competently testify thereto if called as a witness to do so.

2. Attached hereto is a true and correct copy of the declaration of Judy Bishop in support of reply memorandum in support of motion for summary judgment.

3. The original reply was sent today via Federal Express from Elk Grove Township, Illinois to our office and has not yet been received. Therefore, this copy of Judy Bishop's declaration is filed herewith and the original will be filed and served as soon as it is received.

4. I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct.

Executed this 31st day of August 1990 at Los Angeles, California.



STEPHEN E. ENSBERG

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PACIFIC EXPRESS, INC. and PACIFIC EXPRESS HOLDING, INC., Plaintiffs v. UNITED AIR LINES, INC., Defendant	No. CV 84-5185-ER (Mcx) DECLARATION OF JUDY BISHOP

1. I am currently the Regional Manager for Passenger Sales for United Air Lines, Inc. I have been employed by United for 24 years, during which time I have held various positions in sales and marketing. During the early 1980's, I was involved in the Market Management Department for the West Coast markets. In 1983, I was also assigned to Special Projects, one of which was the expansion of the United hub at San Francisco.

2. As a part of my role in the expansion of the San Francisco hub, I was assigned the responsibility to participate in developing and presenting the plan for the expansion to the top management of the company. I also participated, along with others at United, in the discussions with Pacific Express regarding the possibility of a joint marketing agreement between Pacific Express and United.

3. In September 1983, United implemented an expansion of its operations from its San Francisco hub. In that period United initiated or expanded service on a number of routes. United entered only three routes on which Pacific

Express was an incumbent carrier. Those routes were San Francisco-Monterey, San Franciso-Fresno and San Francisco-Redding. On several other routes on which Pacific Express provided service, United increased existing service. United had served these routes for a number of years, and it was Pacific Express that had entered the routes against United.

4. United expanded its operations at its San Francisco hub in September 1983 only after the usual extensive planning process. I am aware that the planning effort that culminated in that expansion was initiated well before 1983 and involved all three of United's major hub airports.

5. United's planning process for the San Francisco expansion continued during its discussions with Pacific Express concerning a possible feeder arrangement in 1983. United did not expand its San Francisco hub in reaction to these discussions. The plans for expansion, including plans for service to Fresno, Monterey, and Redding, had started before Pacific Express approached United with a proposal for a feeder arrangement. To the best of my knowledge, no one representing United ever promised Pacific Express personnel that United would suspend consideration of any plans merely because Pacific Express wanted to propose a feeder relationship.

6. In its September 1983 schedule change, United began new service or added service to fifteen cities from San Francisco. Those fifteen cities were Boise, Eugene, Eureka, Fresno, Las Vegas, Los Angeles, Monterey, Ontario, Portland, Redding, Reno, Sacramento, Santa Barbara, San Diego, and Spokane. It is not true, as Pacific Express alleges, that United then withdrew from those routes or turned them over to WestAir. United continued to fly to

every one of those fifteen cities for at least four years. United still flies to twelve of those cities today.

7. United began or expanded service on each of its San Francisco routes with the full expectation that the routes would make a positive contribution to profitability. We at United expected, among other things, that United's short-haul routes would generate substantial new connecting traffic for other San Francisco routes.

8. One of the principal reasons United flies short-haul routes (such as those flown by Pacific Express) to and from its San Francisco hub is to feed connecting passengers to United's other flights. It is impossible to evaluate whether United's participation on any given route is profitable without taking into account the revenues contributed by connecting passengers.

9. United has never had any ownership interest in or control over WestAir, which now operates as a United Express carrier on the West Coast. WestAir did not become a United Express carrier until July 1, 1986. United did not even enter into a marketing feeder arrangement with WestAir until well after Pacific Express had gone out of business.

10. United has never served many of routes on which Pacific Express claims that United has "monopoly" power, including Chico, Oxnard, Santa Maria, Santa Rosa, San Luis Obispo, and Lake Tahoe. In the case of two other routes, United has not served Modesto and Stockton since 1980.

Judy Bishop

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 10th DAY
OF August, 1990

Notary Public

OFFICIAL SEAL
THOMAS M. CATHCART
Notary Public, State of Illinois
Commission Expires 9/18/93

APPENDIX D

No. 91-55208
IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PACIFIC EXPRESS, INC.
APPELLANT-PETITIONER,
v.
UNITED AIR LINES, INC.
APPELLEE-RESPONDENT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
HONORABLE EDWARD RAFEEDIE,
DISTRICT JUDGE

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

BLECHER & COLLINS, P.C.
MAXWELL M. BLECHER
611 West Sixth Street
Suite 2000
Los Angeles, California 90017
Telephone: (213) 622-4222

Attorneys for Appellant-Petitioner
PACIFIC EXPRESS, INC.

In our Petition For Rehearing And Suggestion for Rehearing En Banc filed on or about April 8, 1992, appellant argued that, having correctly determined that the issue presented for appellate review was whether there was evidence adequate for a jury to find United's conduct to be predatory or anticompetitive, the panel erred in failing to apply summary judgment standards and adjudicate that a justiciable controversy existed on that factual issue. (Petition for Rehearing at 5.)

The decision of the Supreme Court on Monday, June 8, 1992, in Eastman Kodak Co. v. Image Technical Services, Inc., ___ U.S. ___, 60 U.S.L.W. 4465 (U.S. June 8, 1992) (attached hereto as Exhibit 1), bears directly on this question and, we respectfully submit, requires reversal.

The court's attention is invited to page 4474, where the Supreme Court notes that in a Section 2 Sherman Act case, "[l]iability turns, then, on whether 'valid business reasons' can explain Kodak's action," citing to Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605, 105 S. Ct. 2847, 2858 (1985), also relied upon by appellant at page 7 on the Petition for Rehearing.

Noting that Kodak advanced three allegedly valid business justifications for its action, the Supreme Court finds that the grant of summary judgment on any of the three would be inappropriate because plaintiffs " 'have presented evidence from which a reasonable trier of fact could conclude that Kodak's first reason is pretextual.' " 60 U.S.L.W. at 4474 (quoting Image Technical Services, Inc. v. Eastman Kodak Co., 903 F.2d 612, 618 (9th Cir. 1990)).

The Supreme Court went on to reach an identical conclusion on Kodak's second proffered justification. It found that the third business justification was legally insufficient.

The Supreme Court then made this observation which bears directly on appellant's contention in this case. "In the end, of course, Kodak's arguments may prove to be correct. . . . But we cannot reach these conclusions [as to legitimate justification] as a matter of law on a record this sparse." 60 U.S.L.W. at 4474-75.

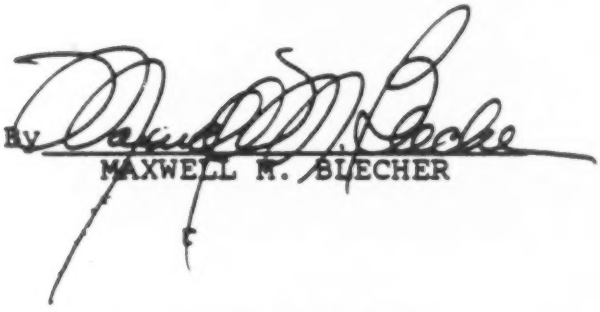
The Supreme Court, in affirming this court's reversal of a grant of summary judgment in Kodak, did so on a record which was expansive in comparison to this. As we have pointed out, this court's opinion affirming summary judgment rests solely on a factually unsupported declaration of Ms. Judy Bishop submitted in support of a reply memorandum in a case where not a single contemporaneous document was produced by United in the course of discovery to support its alleged business justification defenses.

As discussed in the Petition for Rehearing, pages 9-13, there is plenty of controverting evidence from which, as the Supreme Court put it "'a reasonable trier of fact could conclude that [United's] . . . reason is pretextual.'" Kodak, 60 U.S.L.W. at 4474 (quoting Kodak, 903 F.2d at 618).

With due respect, the decision reached by the panel in this case is wrong. It is inconsistent with the law governing summary judgment as clarified by Kodak. We urge that the earlier decision be withdrawn and that the grant of summary judgment be reversed.

Dated: June 18, 1992. Respectfully,

BLECHER & COLLINS, P.C.
MAXWELL M. BLECHER

By 
MAXWELL M. BLECHER

Attorneys for Appellant-
Petitioner PACIFIC
EXPRESS, INC.

6-9-92 *The United States* LAW WEEK 60 LW 4465

No. 90-1029

EASTMAN KODAK COMPANY, PETITIONER *v.* IMAGE TECHNICAL SERVICES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Syllabus

No. 90-1029. Argued December 10, 1991 -- Decided June 8, 1992

After respondent independent service organizations (ISOs) began servicing copying and micrographic equipment manufactured by petitioner Eastman Kodak Co., Kodak adopted policies to limit the availability to ISOs of replacement parts for its equipment and to make it more difficult for ISOs to compete with it in servicing such equipment. Respondents then filed this action, alleging, *inter alia*, that Kodak had unlawfully tied the sale of service for its machines to the sale of parts, in violation of § 1 of the Sherman Act, and had unlawfully monopolized and attempted to monopolize the sale of service and parts for such machines, in violation of § 2 of that Act. The District Court granted summary judgment for Kodak, but the Court of Appeals reversed. Among other things, the appellate court found that respondents had presented sufficient evidence to

raise a genuine issue concerning Kodak's market power in the service and parts markets, and rejected Kodak's contention that lack of market power in service and parts must be assumed when such power is absent in the equipment market.

Held:

1. Kodak has not met the requirements of Fed. Rule Civ. Proc. 56(c) for an award of summary judgment on the § 1 claim.

(a) A tying arrangement *i. e.* an agreement by a party to sell one product on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier violates § 1 only if the seller has appreciable economic power in the tying product market.

(b) Respondents have presented sufficient evidence of a tying arrangement to defeat a summary judgment motion. A reasonable trier of fact could find, first, that service and parts are two distinct products in light of evidence indicating that each has been, and continues in some circumstances to be, sold separately, and, second that Kodak has tied the sale of the two products in light of evidence indicating that it would sell parts to third parties only if they agreed not to buy service from ISOs.

(c) For purposes of determining appreciable economic power in the tying market, this Court's precedents have defined market power as the power to force a purchaser to do something that he would not do in a competitive market, and have ordinarily inferred the existence of such power from the seller's possession of a predominate share of the market.

(d) Respondents would be entitled under such precedents to a trial on their claim that Kodak has sufficient power in the parts market to force unwanted purchases of the tied service market, based on evidence indicating that Kodak has control over the availability of parts and that such control has excluded service competition, boosted service prices, and forced unwilling consumption of Kodak service.

(e) Kodak has not satisfied its substantial burden of showing that, despite such evidence, an inference of market power is unreasonable. Kodak's theory that its lack of market power in the primary equipment market precludes -- as a matter of law -- the possibility of market power in the derivative aftermarkets rests on the factual assumption that if it raised its parts or service prices above competitive levels, potential customers would simply stop buying its equipment. Kodak's theory does not accurately describe actual market behavior, since there is no evidence or assertion that its equipment sales dropped after it raised its service prices. Respondents offer a forceful reason for this discrepancy: the existence of significant information and switching costs that could create a less responsive connection between aftermarket prices and equipment sales. It is plausible to infer from respondents' evidence that Kodak chose to gain immediate profits by exerting market power where locked-in customers, high information costs, and discriminatory pricing limited and perhaps eliminated any long-term loss.

(f) Nor is this Court persuaded by Kodak's contention that it is entitled to a legal presumption on the lack of market power because there is a significant risk of deterring procompetitive conduct. Because Kodak's service and parts

policy is not one that appears always or almost always to enhance competition, the balance tips against summary judgment.

2. Respondents have presented genuine issues for trial as to whether Kodak has monopolized or attempted to monopolize the service and parts markets in violation of § 2.

(a) Respondents' evidence that Kodak controls nearly 100% of the parts market and 80% to 95% of the service market, with no readily available substitutes, is sufficient to survive summary judgment on the first element of the monopoly offense, the possession of monopoly power. Kodak's contention that, as a matter of law, a single brand of a product or service can never be a relevant market contravenes cases of this Court indicating that one brand of a product can constitute a separate market in some instances. The proper market definition in this case can be determined only after a factual inquiry into the commercial realities faced by Kodak equipment owners.

(b) As to the second element of a § 2 claim, the willful use of monopoly power, respondents have presented evidence that Kodak took exclusionary action to maintain its parts monopoly and used its control over parts to strengthen its monopoly share of the service market. Thus, liability turns on whether valid business reasons can explain Kodak's actions. However, none of its asserted business justifications -- a commitment to quality service, a need to control inventory costs, and a desire to prevent ISOs from free-riding on its capital investment -- are sufficient to prove that it is entitled to a judgment as a matter of law.

903 F. 2d 612, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, STEVENS, KENNEDY, and SOUTER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which O'CONNOR and THOMAS, JJ., joined.

JUSTICE BLACKMUN delivered the opinion of the Court.

This is yet another case that concerns the standard for summary judgment in an antitrust controversy. The principal issue here is whether a defendant's lack of market power in the primary equipment market precludes -- as a matter of law -- the possibility of market power in derivative aftermarkets.

Petitioner Eastman Kodak Company manufactures and sells photocopiers and micrographic equipment. Kodak also sells service and replacement parts for its equipment. Respondents are 18 independent service organizations (ISOs) that in the early 1980s began servicing Kodak copying and micrographic equipment. Kodak subsequently adopted policies to limit the availability of parts to ISOs and to make it more difficult for ISOs to compete with Kodak in servicing Kodak equipment.

Respondents instituted this action in the United States District Court for the Northern District of California alleging that Kodak's policies were unlawful under both §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. After truncated discovery, the District Court granted summary judgment for Kodak. The Court of Appeals for the Ninth Circuit reversed. The appellate court found that respondents had presented sufficient evidence to raise a genuine issue concerning Kodak's market power in the service and parts markets. It rejected Kodak's contention that lack of market

power in service and parts must be assumed when such power is absent in the equipment market. Because of the importance of the issue, we granted certiorari. ___ U.S. ___ (1991).

I

A

Because this case comes to us on petitioner Kodak's motion for summary judgment, "[t]he evidence of [respondents] is to be believed, and all justifiable inferences are to be drawn in [their] favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Mindful that respondents' version of any disputed issue of fact thus is presumed correct, we begin with the factual basis of respondents' claims. See *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 339 (1982).

Kodak manufactures and sells complex business machines -- as relevant here, high-volume photocopier and micrographics equipment.[1] Kodak equipment is unique; micrographic software programs that operate on Kodak machines, for example, are not compatible with competitors' machines. See App. 424-425, 487-489, 537. Kodak

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[1] Kodak's micrographic equipment includes four different product areas. The first is capture products such as microfilmers and electronic scanners, which compact an image and capture it on microfilm. The second is equipment such as microfilm viewers and viewer/printers. This equipment is used to retrieve the images. The third is Computer Output Microform (COM) recorders, which are data-processing peripherals that record computer-generated data onto microfilm. The fourth is Computer Assisted Retrieval (CAR) systems, which utilize computers to locate and retrieve micrographic images. See App. 156-158.

parts are not compatible with other manufacturers' equipment, and vice versa. See *id.*, at 432, 413-415. Kodak equipment, although expensive when new, has little resale value. See *id.*, at 358-359, 424-425, 427-428, 467, 505-506, 519-521.

Kodak provides service and parts for its machines to its customers. It produces some of the parts itself; the rest are made to order for Kodak by independent original-equipment manufacturers (OEMs). See *id.*, at 429, 465, 490, 496. Kodak does not sell a complete system of original equipment, lifetime service, and lifetime parts for a single price. Instead, Kodak provides service after the initial warranty period either through annual service contracts, which include all necessary parts, or on a per-call basis. See *id.*, at 98-99; Brief for Petitioner 3. It charges, through negotiations and bidding, different prices for equipment, service, and parts for different customers. See App., at 420-421, 536. Kodak provides 80% to 95% of the service for Kodak machines. See *id.*, at 430.

Beginning in the early 1980s, ISOs began repairing and servicing Kodak equipment. They also sold parts and reconditioned and sold used Kodak equipment. Their customers were federal, state, and local government agencies, banks, insurance companies, industrial enterprises, and providers of specialized copy and microfilming services. See *id.*, at 417, 419-421, 492-493, 499, 516, 539. ISOs provide service at a price substantially lower than Kodak does. See *id.*, at 414, 451, 453-454, 469, 474-475, 488, 493, 536-537; Lodging 133. Some customers found that the ISO service was of higher quality. See App. 425-426, 537-538.

Some of the ISOs' customers purchase their own parts and hire ISOs only for service. See Lodging 144-147. Others choose ISOs to supply both service and parts. See *id.*, at 133. ISOs keep an inventory of parts, purchased from Kodak or other sources, primarily the OEMs.[2] See App. 99, 415-416, 490.

In 1985 and 1986, Kodak implemented a policy of selling replacement parts for micrographic and copying machines only to buyers of Kodak equipment who use Kodak service or repair their own machines. See Brief for Petitioner 6; App. 91-92, 98-100, 140-141, 171-172, 190, 442-447, 455-456, 483, 484.

As part of the same policy, Kodak sought to limit ISO access to other sources of Kodak parts. Kodak and the OEMs agreed that the OEMs would not sell parts that fit Kodak equipment to anyone other than Kodak. See *id.*, at 417, 428-429, 447, 468, 474, 496. Kodak also pressured Kodak equipment owners and independent parts distributors not to sell Kodak parts to ISOs. See *id.*, at 419-420, 428-429, 483-484, 517-518, 589-590. In addition, Kodak took steps to restrict the availability of used machines. See *id.*, at 427-428, 465-466, 510-511, 520.

Kodak intended, through these policies, to make it more difficult for ISOs to sell service for Kodak machines. See *id.*, at 106-107, 171, 516. It succeeded. ISOs were unable to obtain parts from reliable sources, see *id.*, at 429,

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[2] In addition to the OEMs, other sources of Kodak parts include (1) brokers who would buy parts from Kodak, or strip used Kodak equipment to obtain the useful parts and resell them, (2) customers who buy parts from Kodak and make them available to ISOs, and (3) used equipment to be stripped for parts. See *id.*, at 419, 517; Brief for Petitioner 38.

468, 496, and many were forced out of business, while others lost substantial revenue. See *id.*, at 422, 458-459, 464, 468, 475-477, 482-484, 495-496, 501, 521. Customers were forced to switch to Kodak service even though they preferred ISO service. See *id.*, at 420-422.

B

In 1987, the ISOs filed the present action in the District Court, alleging, *inter alia*, that Kodak had unlawfully tied the sale of service for Kodak machines to the sale of parts, in violation of §1 of the Sherman Act, and had unlawfully monopolized and attempted to monopolize the sale of service for Kodak machines, in violation of §2 of that Act.[3]

Kodak filed a motion for summary judgment before respondents had initiated discovery. The District Court permitted respondents to file one set of interrogatories and one set of request for production of documents, and to take six depositions. Without a hearing, the District Court granted summary judgment in favor of Kodak. App. to Pet. for Cert. 29B.

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[3] Section 1 of the Sherman Act states in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.

Section 2 of the Sherman Act states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." 15 U.S.C. § 2.

As to the §1 claim, the court found that respondents had provided no evidence of a tying arrangement between Kodak equipment and service or parts. See App. to Pet. for Cert. 32B-33B. The court, however, did not address respondents' §1 claim that is at issue here. Respondents allege a tying arrangement not between Kodak *equipment* and service, but between Kodak *parts* and service. As to the §2 claim, the District Court concluded that although Kodak had a "natural monopoly over the market for parts it sells under its name," a unilateral refusal to sell those parts to ISOs did not violate §2.

The Court of Appeals for the Ninth Circuit, by a divided vote, reversed. 903 F.2d 612 (1990). With respect to the §1 claim, the court first found that whether service and parts were distinct markets and whether a tying arrangement existed between them were disputed issues of fact. *Id.*, at 615-616. Having found that a tying arrangement might exist, the Court of Appeals considered a question not decided by the District Court: was there "an issue of material fact as to whether Kodak has sufficient economic power in the tying product market [parts] to restrain competition appreciably in the tied product market [service]." *Id.*, at 616. The court agreed with Kodak that competition in the equipment market might prevent Kodak from possessing power in the parts market, but refused to uphold the District Court's grant of summary judgment "on this theoretical basis" because "market imperfections can keep economic theories about how consumers will act from mirroring reality." *Id.*, at 617. Noting that the District Court had not considered the market power issue, and that the record was not fully developed through discovery, the court declined to require respondents to conduct market analysis or to pinpoint specific imperfections in order to

withstand summary judgment.[4] "It is enough that [respondents] have presented evidence of actual events from which a reasonable trier of fact could conclude that . . . competition in the [equipment] market does not, in reality, curb Kodak's power in the parts market." *Ibid.*

The court then considered the three business justifications Kodak proffered for its restrictive parts policy: (1) to guard against inadequate service, (2) to lower inventory costs, and (3) to prevent ISOs from free-riding on Kodak's investment in the copier and micrographic industry. The court concluded that the trier of fact might find the product quality and inventory reasons to be pretextual and that there was a less restrictive alternative for achieving Kodak's quality-related goals. *Id.*, at 618-619. The court also found Kodak's third justification, preventing ISOs from profiting on Kodak's investments in the equipment markets, legally insufficient. *Id.*, at 619.

As to the §2 claim, the Court of Appeals concluded that sufficient evidence existed to support a finding that Kodak's implementation of its parts policy was "anticompetitive" and "exclusionary" and "involved a specific intent to monopolize." *Id.*, at 620. It held that the ISOs had come forward with sufficient evidence, for

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[4] Specifically, the Court of Appeals explained that the District Court had denied the request for further discovery made by respondents in their opposition to Kodak's summary judgment motion: "For example, [respondents] requested to depose two ISO customers who allegedly would not sign accurate statements concerning Kodak's market power in the parts market. Not finding it necessary to reach the market power issue in its decision, the district court, of course, had no reason to grant this request." 903 F.2d 612, 617, n. 4 (CA9 1990).

summary judgment purposes, to disprove Kodak's business justifications. *Ibid.*

The dissent in the Court of Appeals, with respect to the §1 claim, accepted Kodak's argument that evidence of competition in the equipment market "*necessarily* precludes power in the derivative market." *Id.*, at 622 (emphasis in original). With respect to the §2 monopolization claim, the dissent concluded that, entirely apart from market power considerations, Kodak was entitled to summary judgment on the basis of its first business justification because it had "submitted extensive and undisputed evidence of a marketing strategy based on high-quality service." *Id.*, at 623.

II

A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5-6 (1958). Such an arrangement violates §1 of the Sherman Act if the seller has "appreciable economic power" in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 503 (1969).

Kodak did not dispute that its arrangement affects a substantial volume of interstate commerce. It, however, did challenge whether its activities constituted a "tying arrangement" and whether Kodak exercised "appreciable economic power" in the tying market. We consider these issues in turn.

A

For respondents to defeat a motion for summary judgment on their claim of a tying arrangement, a reasonable trier of fact must be able to find, first, that service and parts are two distinct products, and, second, that Kodak has tied the sale of the two products.

For service and parts to be considered two distinct products, there must be sufficient consumer demand so that it is efficient for a firm to provide service separately from parts. *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 21-22 (1984). Evidence in the record indicates that service and parts have been sold separately in the past and still are sold separately to self-service equipment owners.[5] Indeed, the development of the entire high-technology service industry is evidence of the efficiency of a separate market for service.[6]

Kodak insists that because there is no demand for parts separate from service, there cannot be separate markets for service and parts. Brief for Petitioner 15, n. 3. By that logic, we would be forced to conclude that there can never be separate markets, for example, for cameras

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[5] The Court of Appeals found: "Kodak's policy of allowing customers to purchase parts on condition that they agree to service their own machines suggests that the demand for parts can be separated from the demand for service." *Id.*, at 616.

[6] *Amicus* briefs filed by various service organizations attest to the magnitude of the service business. See *e.g.*, Brief for Computer Service Network International as *Amicus Curiae*; Brief for National Electronics Sales and Service Dealers Association as *Amicus Curiae*; Brief for California State Electronics Association, et al. as *Amici Curiae*; Brief for National Office Machine Dealers and Association of Service Dealers as *Amicus Curiae*.

and film, computers and software, or automobiles and tires. That is an assumption we are unwilling to make. "We have often found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices." *Jefferson Parish*, 466 U.S., at 19, n. 30.

Kodak's assertion also appears to be incorrect as a factual matter. At least some consumers would purchase service without parts, because some service does not require parts, and some consumers, those who self-service for example, would purchase parts without service.[7] Enough doubt is cast on Kodak's claim of a unified market that it should be resolved by the trier of fact.

Finally, respondents have presented sufficient evidence of a tie between service and parts. The record indicates that Kodak would sell parts to third parties only if they agreed not to buy service from ISOs.[8]

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[7] The dissent suggests that parts and service are not separate products for tying purposes because all service may involve installation of parts. *Post*, at 9-10, n. 2. Because the record does not support this factual assertion, under the approach of both the Court and the concurrence in *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 1 (1984), Kodak is not entitled to summary judgment on whether parts and service are district markets.

[8] In a footnote, Kodak contends that this practice is only a unilateral refusal to deal, which does not violate the antitrust laws. See Brief for Petitioner 15, n. 4. Assuming, *arguendo*, that Kodak's refusal to sell parts to any company providing service can be characterized as a unilateral refusal to deal, its alleged sale of parts to third parties on condition that they buy service from Kodak is not. See 903 F.2d, at 619.

B

Having found sufficient evidence of a tying arrangement, we consider the other necessary feature of an illegal tying arrangement: appreciable economic power in the tying market. Market power is the power "to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish*, 466 U.S., at 14.[9] It has been defined as "the ability of a single seller to raise price and restrict output." *Fortner Inc.*, 394 U.S., at 503; *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). The existence of such power ordinarily is inferred from the seller's possession of a predominant share of the market. *Jefferson Parish*, 466 U.S., at 17; *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 611-613 (1953).

1

Respondents contend that Kodak has more than sufficient power in the parts market to force unwanted purchases of the tied market, service. Respondents provide evidence that certain parts are available exclusively through Kodak. Respondents also assert that Kodak has control over the availability of parts it does not manufacture. According to respondents' evidence, Kodak has prohibited independent manufacturers from selling Kodak parts to ISOs, pressured

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[9] "[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such 'forcing' is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated." *Jefferson Parish*, 466 U.S., at 12.

Kodak equipment owners and independent parts distributors to deny ISOs the purchase of Kodak parts, and taken steps to restrict the availability of used machines.

Respondents also allege that Kodak's control over the parts market has excluded service competition, boosted service prices, and forced unwilling consumption of Kodak service. Respondents offer evidence that consumers have switched to Kodak service even though they preferred ISO service, that Kodak service was of higher price and lower quality than the preferred ISO service, and that ISOs were driven out of business by Kodak's policies. Under our prior precedents, this evidence would be sufficient to entitle respondents to a trial on their claim of market power.

2

Kodak counters that even if it concedes monopoly *share* of the relevant parts market, it cannot actually exercise the necessary market *power* for a Sherman Act violation. This is so, according to Kodak, because competition exists in the equipment market.[10] Kodak argues that it

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[10] In their brief and at oral argument, respondents argued that Kodak's market share figures for high-volume copy machines, computer-assisted retrieval systems, and micrographic-capture equipment demonstrate Kodak's market power in the equipment market. Brief for Respondents 16-18, 32-33; Tr. of Oral Arg. 28-31.

In the Court of Appeals, however, respondents did not contest Kodak's assertion that its market shares indicated a competitive [equipment] market. The Court of Appeals believed that respondents "do not dispute Kodak's assertion that it lacks market power in the [equipment markets." 903 F.2d at 616, n. 3. Nor did respondents question Kodak's asserted lack of market power in their Brief in Opposition to the Petition for Certiorari, although they acknowledged that Kodak's entire case rested on its understanding that respondents

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could not have the ability to raise prices of service and parts above the level that would be charged in a competitive market because any increase in profits from a higher price in the aftermarkets at least would be offset by a corresponding loss in profits from lower equipment sales as consumers began purchasing equipment with more attractive service costs.

Kodak does not present any actual data on the equipment, service, or parts markets. Instead, it urges the adoption of a substantive legal rule that "equipment competition precludes any finding of monopoly power in derivative aftermarkets." Brief for Petitioner 33. Kodak argues that such a rule would satisfy its burden as the moving party of showing "that there is no genuine issue as to any

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[10](...continued)
were not disputing the existence of competition in the equipment market. Brief in Opposition 8.

Recognizing that on summary judgment we may examine the record *dc novo*, without relying on the lower courts' understanding, *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962), respondents now ask us to decline to reach the merits of the questions presented in the petition, and instead to affirm the Ninth Circuit's judgment based on the factual dispute over market power in the equipment market. We decline respondents' invitation. We stated in *Oklahoma City v. Tuttle*, 471 U. S. 808, 816 (1985): "Our decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition." Because respondents failed to bring their objections to the premise underlying the questions presented to our attention in their opposition to the petition for certiorari, we decide those questions based on the same premise as the Court of Appeals, namely, that competition exists in the equipment market.

material fact" on the market power issue.[11] See Fed. Rule Civ. Proc. 56(c).

Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the "particular facts disclosed by the record." *Maple Flooring Mfrs. Assn. v. United States*, 268 U.S. 563, 579 (1925); *du Pont*, 351 U.S., at 395, n. 22; *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 70 (1977) (WHITE, J., concurring in judgment).[12] In determining the existence

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[11] Kodak argues that such a rule would be *per se*, with no opportunity for respondents to rebut the conclusion that market power is lacking in the parts market. See Brief for Petitioner 30-31 ("There is nothing that respondents could prove that would overcome Kodak's conceded lack of market power"); *id.*, at 30 (discovery is "pointless" once the "dispositive fact" of lack of market power in the equipment market is conceded); *id.*, at 22 (Kodak's lack of market power in the equipment market "dooms any attempt to extract monopoly profits" even in an allegedly imperfect market); *id.*, at 25 (it is "impossible" for Kodak to make more total profit by overcharging its existing customers for service).

As an apparent second-best alternative, Kodak suggests elsewhere in its brief that the rule would permit a defendant to meet its summary judgment burden under Fed. Rule Civ. Proc. 56(c); the burden would then shift to the plaintiffs to "prove. . . that there is a specific reason to believe that normal economic reasoning does not apply." Brief for Petitioner 30. This is the United States' position. See Brief for United States as *Amicus Curiae* 10-11.

[12] See generally *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723-726 (1988); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 458-459 (1986); *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 100-104 (1984); *Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977).

of market power, and specifically the "responsiveness of the sales of one product to price changes of the other," *du Pont*, 351 U.S., at 400; see also *id.*, at 394-395, and 400-401, this Court has examined closely the economic reality of the market at issue.[13]

Kodak contends that there is no need to examine the facts when the issue is market power in the aftermarkets. A legal presumption against a finding of market power is warranted in this situation, according to Kodak, because the existence of market power in the service and parts markets absent power in the equipment market "simply makes no economic sense," and the absence of a legal presumption would deter procompetitive behavior. *Matsushita*, 475 U.S., at 587; *id.*, at 594-595.

Kodak analogizes this case to *Matsushita* where a group of American corporations that manufactured or sold consumer electronic products alleged that their 21 Japanese counterparts were engaging in a 20-year conspiracy to price below cost in the United States in the hope of expanding their market share sometime in the future. After several years of detailed discovery, the defendants moved for summary judgment. 475 U.S., at 577-582. Because the defendants had every incentive not to engage in the alleged conduct which required them to sustain losses for decades

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[13] See, *e.g.*, *Jefferson Parish*, 466 U.S. at 26-29; *United States v. Connecticut National Bank*, 418 U.S. 656, 661-666 (1974); *United States v. Grinnell Corp.*, 384 U.S. 563, 571-576 (1966); *International Boxing Club of New York, Inc. v. United States*, 358 U.S. 242, 250-251 (1959); see also *Jefferson Parish*, 466 U.S., at 37, n. 6 (O'CONNOR, J., concurring) (citing cases and describing the careful consideration the Court gives to the particular facts when determining market power).

with no foreseeable profits, the Court found an "absence of any rational motive to conspire." *Id.*, at 957. In that context, the Court determined that the plaintiffs' theory of predatory pricing makes no practical sense, was "speculative" and was not "reasonable." *Id.*, at 588, 590, 593, 595, 597. Accordingly, the Court held that a reasonable jury could not return a verdict for the plaintiffs and that summary judgment would be appropriate against them unless they came forward with more persuasive evidence to support their theory. *Id.*, at 587-588, 595-598.

The Court's requirement in *Matsushita* that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did not hold that if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision.[14]

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[14] See, *e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("summary judgment will not lie . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party"); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984) (to survive summary judgment there must be evidence that "reasonably tends to prove" plaintiff's theory); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-289 (1968) (defendant meets his burden under Rule 56(c) when he "conclusively show[s] that the facts upon which [the plaintiff] relied to support his allegation were not susceptible of the interpretation which he sought to give them"); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 375 (1927). See also *H.L. Hayden Co. of New York, Inc. v. Siemens Medical Systems, Inc.*, 879 F.2d 1005, 1012 (CA2 1989) ("only

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If the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted.

Kodak, then, bears a substantial burden in showing that it is entitled to summary judgment. It must show that despite evidence of increased prices and excluded competition, an inference of market power is unreasonable. To determine whether Kodak has met that burden, we must unravel the factual assumptions underlying its proposed rule that lack of power in the equipment market necessarily precludes power in the aftermarkets.

The extent to which one market prevents exploitation of another market depends on the extent to which consumers will change their consumption of one product in response to a price change in another, *i.e.*, the "cross-elasticity of demand." See *du Pont*, 351 U.S., at 400; P. Areeda & L. Kaplow, Antitrust Analysis ¶ 342(c) (4th ed. 1988).[15] Kodak's proposed rule rests on a factual assump-

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[14](...continued)
reasonable inferences can be drawn from the evidence in favor of the nonmoving party") (emphasis in original); *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335, 1339 (CA3 1987) (*Matsushita* directs us " 'to consider whether the inference of conspiracy is reasonable' "); *Instructional Systems Development Corp. v. Aetna Casualty & Surety Co.*, 817 F.2d 639, 646 (CA10 1987) (summary judgment not appropriate under *Matsushita* when defendants "could reasonably have been economically motivated").

[15] What constrains the defendant's ability to raise prices in the service market is "the elasticity of demand faced by the defendant -- the degree to which its sales fall . . . as its price rises." P. Areeda & L. Kaplow, Antitrust Analysis ¶ 342(c) (4th ed. 1988).

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tion about the cross-elasticity of demand in the equipment and aftermarkets: "If Kodak raised its parts or service prices above competitive levels, potential customers would simply stop buying Kodak equipment. Perhaps Kodak would be able to increase short term profits through such a strategy, but at a devastating cost to its long term interests."[16] Brief for Petitioner 12. Kodak argues that the Court should accept, as a matter of law, this "basic economic realit[y]," *id.*, at 24, that competition in the equipment

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[15](...continued)

Courts usually have considered the relationship between price in one market and demand in another in defining the relevant market. Because market power is often inferred from market share, market definition general determines the result of the case. Pitofsky, New Definitions of Relevant Market and the Assault on Antitrust, 90 Colum. L. Rev. 1805, 1806-1813 (1990). Kodak chose to focus on market power directly rather than arguing that the relationship between equipment and service and parts is such that the three should be included in the same market definition. Whether considered in the conceptual category of "market definition" or "market power," the ultimate inquiry is the same -- whether competition in the equipment market will significantly restrain power in the service and parts markets.

[16] The United States as *Amicus Curiae* in support of Kodak echoes this argument: "The ISOs' claims are implausible because Kodak lacks market power in the markets for its copier and micrographic equipment. Buyers of such equipment regard an increase in the price of parts or service as an increase in the price of the equipment, and sellers recognize that the revenues from sales of parts and service are attributable to sales of the equipment. In such circumstances, it is not apparent how an equipment manufacturer such as Kodak could exercise power in the aftermarkets for parts and service." Brief for United States as *Amicus Curiae* 8.

market necessarily prevents market power in the aftermarkets.[17]

Even if Kodak could not raise the price of service and parts one cent without losing equipment sales, that fact would not disprove market power in the aftermarkets. The sales of even a monopolist are reduced when it sells goods at a monopoly price, but the higher price more than compensates for the loss in sales. Areeda & Kaplow, at ¶¶ 112 and 340(a). Kodak's claim that charging more for service and parts would be "a short-run game," Brief for Petitioner 26, is based on the false dichotomy that there are only two prices that can be charged -- a competitive price or a ruinous one. But there could easily be a middle, optimum price at which the increased revenues from the higher-priced sales of service and parts would more than compensate for the lower revenues from lost equipment sales. The fact that the equipment market imposes a restraint on prices in the aftermarkets by no means disproves the existence of power in those markets. See Areeda & Kaplow, at ¶ 340(b) ("[T]he existence of significant substitution in the event of *further* price increases or even at the *current* price does not tell us whether the defendant *already* exercises significant market power") (emphasis in original). Thus, contrary to Kodak's assertion, there is no immutable physical law -- no "basic economic reality" -- insisting that competition in the equipment market cannot coexist with market power in the aftermarkets.

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[17] It is clearly true, as the United States claims, that Kodak "cannot set service or parts prices without regard to the impact on the market for equipment." *Id.*, at 20. The fact that the cross-elasticity of demand is not zero proves nothing; the disputed issue is how much of an impact an increase in parts and service prices has on equipment sales and on Kodak's profits.

We next consider the more narrowly drawn question: Does Kodak's theory describe actual market behavior so accurately that respondents' assertion of Kodak market power in the aftermarkets, if not impossible, is at least unreasonable?[18] Cf. *Matsushita, supra.*

To review Kodak's theory, it contends that higher service prices will lead to a disastrous drop in equipment sales. Presumably, the theory's corollary is to the effect that low service prices lead to a dramatic increase in equipment sales. According to the theory, one would have expected Kodak to take advantage of lower-priced ISO service as an opportunity to expand equipment sales. Instead, Kodak adopted a restrictive sales policy consciously designed to eliminate the lower-priced ISO service, an act that would be expected to devastate either Kodak's equipment sales or Kodak's faith in its theory. Yet, according to

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[18] Although Kodak repeatedly relies on *Continental T.V.* as support for its factual assertion that the equipment market will prevent exploitation of the service and parts markets, the case is inapposite. In *Continental T.V.*, the Court found that a manufacturer's policy restricting the number of retailers that were permitted to sell its product could have a pro-competitive effect. See 433 U.S., at 55. The Court also noted that any negative effect of exploitation of the intrabrand market (the competition between retailers of the same product) would be checked by competition in the interbrand market (competition over the same generic product) because consumers would substitute a different brand of the same product. Unlike *Continental T.V.*, this case does not concern vertical relationships between parties on different levels of the same distribution chain. In the relevant market, service, Kodak and the ISOs are direct competitors: their relationship is horizontal. The interbrand competition at issue here is competition over the provision of service. Despite petitioner's best effort, repeating the mantra "interbrand competition" does not transform this case into one over an agreement the manufacturer has with its dealers that would fall under the rubric of *Continental T.V.*

the record, it has done neither. Service prices have risen for Kodak customers, but there is no evidence or assertion that Kodak equipment sales have dropped.

Kodak and the United States attempt to reconcile Kodak's theory with the contrary actual results by describing a "marketing strategy of spreading over time the total cost to the buyer of Kodak equipment." Brief for United States as *Amicus Curiae* 18; see also Brief for Petitioner 18. In other words, Kodak could charge subcompetitive prices for equipment and make up the difference with supracompetitive prices for service, resulting in an overall competitive price. This pricing strategy would provide an explanation for the theory's descriptive failings -- if Kodak in fact had adopted it. But Kodak never has asserted that it prices its equipment or parts subcompetitively and recoups its profits through service. Instead, it claims that it prices its equipment comparably to its competitors, and intends that both its equipment sales and service divisions be profitable. See App. 159-161, 170, 178, 188. Moreover, this hypothetical pricing strategy is inconsistent with Kodak's policy toward its self-service customers. If Kodak were underpricing its equipment, hoping to lock in customers and recover its losses in the service market, it could not afford to sell customers parts without service. In sum, Kodak's theory does not explain the actual market behavior revealed in the record.

Respondents offer a forceful reason why Kodak's theory, although perhaps intuitively appealing, may not accurately explain the behavior of the primary and derivative markets for complex durable goods: the existence of significant information and switching costs. These costs

could create a less responsive connection between service and parts prices and equipment sales.

For the service-market price to affect equipment demand, consumers must inform themselves of the total cost of the "package" -- equipment, service and parts -- at the time of purchase; that is, consumers must engage in accurate lifecycle pricing.[19] Lifecycle pricing of complex, durable equipment is difficult and costly. In order to arrive at an accurate price, a consumer must acquire a substantial amount of raw data and undertake sophisticated analysis. The necessary information would include data on price, quality, and availability of products needed to operate, upgrade, or enhance the initial equipment, as well as service and repair costs, including estimates of breakdown frequency, nature of repairs, price of service and parts, length of "down-time" and losses incurred from down-time.[20]

Much of this information is difficult -- some of it impossible -- to acquire at the time of purchase. During the life of a product, companies may change the service and parts prices, and develop products with more advanced features, a decreased need for repair, or new warranties. In

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[19] See Craswell, Tying Requirements in Competitive Markets: The Consumer Protection Issues, 62 B. U. L. Rev. 661, 676 (1982); Beales, Craswell, & Salop, The Efficient Regulation of Consumer Information, 24 J. Law & Econ. 491, 509-511 (1981); *Jefferson Parish*, 466 U.S., at 15.

[20] In addition, of course, in order to price accurately the equipment, a consumer would need initial purchase information such as prices, features, quality, and available warranties, for different machinery with different capabilities, and residual value information such as the longevity of product use and its potential resale or trade-in value.

addition, the information is likely to be customer-specific; lifecycle costs will vary from customer to customer with the type of equipment, degrees of equipment use, and costs of down-time.

Kodak acknowledges the cost of information, but suggests, again without evidentiary support, that customer information needs will be satisfied by competitors in the equipment markets. Brief for Petitioner 26, n. 11. It is a question of fact, however, whether competitors would provide the necessary information. A competitor in the equipment market may not have reliable information about the lifecycle costs of complex equipment it does not service or the needs of customers it does not serve. Even if competitors had the relevant information, it is not clear that their interests would be advanced by providing such information to consumers. See 2 P. Areeda & D. Turner, Antitrust Law, ¶ 404b1 (1978).[21]

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[21] To inform consumers about Kodak, the competitor must be willing to forgo the opportunity to reap supracompetitive prices in its own service and parts markets. The competitor may anticipate that charging lower service and parts prices and informing consumers about Kodak in the hopes of gaining future equipment sales will cause Kodak to lower the price on its service and parts, cancelling any gains in equipment sales to the competitor and leaving both worse off. Thus, in an equipment market with relatively few sellers, competitors may find it more profitable to adopt Kodak's service and parts policy than to inform the consumers. See 2 P.Areeda & D. Turner, Antitrust Law ¶ 404b1 (1978); App. 177 (Kodak, Xerox, and IBM together have nearly 100% of relevant market).

Even in a market with many sellers, any one competitor may not have sufficient incentive to inform consumers because the increased patronage attributable to the corrected consumer beliefs will be shared among other competitors. Beales, Craswell & Salop, 24 J. Law & Econ., at 503-504, 506.

Moreover, even if consumers were capable of acquiring and processing the complex body of information, they may choose not to do so. Acquiring the information is expensive. If the costs of service are small relative to the equipment price, or if consumers are more concerned about equipment capabilities than service costs, they may not find it cost-efficient to compile the information. Similarly, some consumers, such as the Federal Government, have purchasing systems that make it difficult to consider the complete cost of the "package" at the time of purchase. State and local governments often treat service as an operating expense and equipment as a capital expense, delegating each to a different department. These governmental entities do not lifecycle prices, but rather choose the lowest price in each market. See Brief for National Association of State Purchasing Officials et al., as *Amici Curiae*; Brief for State of Ohio et al., as *Amici Curiae*; App. 429-430.

As Kodak notes, there likely will be some large-volume, sophisticated purchasers who will undertake the comparative studies and insist, in return for their patronage, that Kodak charge them competitive lifecycle prices. Kodak contends that these knowledgeable customers will hold down the package price for all other customers. Brief for Petitioner 23, n. 9. There are reasons, however, to doubt that sophisticated purchasers will ensure that competitive prices are charged to unsophisticated purchasers, too. As an initial matter, if the number of sophisticated customers is relatively small, the amount of profits to be gained by supracompetitive pricing in the service market could make it profitable to let the knowledgeable consumers take their business elsewhere. More importantly, if a company is able to price-discriminate between sophisticated and unsophisti-

cated consumers, the sophisticated will be unable to prevent the exploitation of the uninformed. A seller could easily price-discriminate by varying the equipment/parts/service package, developing different warranties, or offering price discounts on different components.

Given the potentially high cost of information and the possibility a seller may be able to price-discriminate between knowledgeable and unsophisticated consumers, it makes little sense to assume, in the absence of any evidentiary support, that equipment-purchasing decisions are based on an accurate assessment of the total cost of equipment, service, and parts over the lifetime of the machine.[22]

Indeed, respondents have presented evidence that Kodak practices price-discrimination by selling parts to customers who service their own equipment, but refusing to sell parts to customers who hire third-party service companies. Companies that have their own service staff are likely to be high-volume users, the same companies for whom it is most likely to be economically worthwhile to acquire the complex information needed for comparative lifecycle pricing.

A second factor undermining Kodak's claim that supracompetitive prices in the service market lead to ruinous losses in equipment sales is the cost to current owners of switching to a different product. See Areeda &

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[22] See Salop & Stiglitz, Bargains and Ripoffs: A Model of Monopolistically Competitive Price Dispersion, 44 Rev. Econ. Studies 493 (1977); Salop, Information and Market Structure -- Information and Monopolistic Competition, 66 Am. Econ. Rev. 240 (1976); Stigler, The Economics of Information, 69 J. Pol. Econ. 213 (1961).

Turner, at ¶ 519a.[23] If the cost of switching is high, consumers who already have purchased the equipment, and are thus "locked-in," will tolerate some level of service-price increases before changing equipment brands. Under this scenario, a seller profitably could maintain supracompetitive prices in the aftermarket if the switching costs were high relative to the increase in service prices, and the number of locked-in customers were high relative to the number of new purchasers.

Moreover, if the seller can price-discriminate between its locked-in customers and potential new customers, this strategy is even more likely to prove profitable. The seller could simply charge new customers below-marginal cost on the equipment and recoup the charges in service, or offer packages with life-time warranties or long-term service agreements that are not available to locked-in customers.

Respondents have offered evidence that the heavy initial outlay for Kodak equipment, combined with the required support material that works only with Kodak equipment, makes switching costs very high for existing Kodak customers. And Kodak's own evidence confirms that it varies the package price of equipment/parts/service for different customers.

In sum, there is a question of fact whether information costs and switching costs foil the simple assumption

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[23] A firm can exact leverage whenever other equipment is not a ready substitute. F.M. Scherer & D. Ross, Industrial Market Structure and Economic Performance 16-17 (3d ed. 1990).

that the equipment and service markets act as pure complements to one another.[24]

We conclude, then, that Kodak has failed to demonstrate that respondents' inference of market power in the service and parts markets is unreasonable, and that, consequently, Kodak is entitled to summary judgment. It is clearly reasonable to infer that Kodak has market power to raise prices and drive out competition in the aftermarkets, since respondents offer direct evidence that Kodak did so.[25] It is also plausible, as discussed above, to infer that Kodak chose to gain immediate profits by exerting that market power where locked-in customers, high information costs, and discriminatory pricing limited and perhaps eliminated any long-term loss. Viewing the evidence in the light most favorable to respondents, their allegations of market power "mak[e]. . . economic sense." Cf. *Matsushita*, 475 U.S., at 587.

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[24] The dissent disagrees based on its hypothetical case of a tie between equipment and service. "The only thing lacking" to bring this case within the hypothetical case, states the dissent, "is concrete evidence that the restrictive parts policy was . . . generally known." *Post*, at 7. But the dissent's "only thing lacking" is the crucial thing lacking -- evidence. Whether a tie between parts and service should be treated identically to a tie between equipment and service, as the dissent and Kodak argue, depends on whether the equipment market prevents the exertion of market power in the parts market. Far from being "anomalous," *post*, at 8, requiring Kodak to provide evidence on this factual question is completely consistent with our prior precedent. See, *e.g.*, n. 13, *supra*.

[25] Cf. *Instructional Systems*, 817 F.2d, at 646 (finding the conspiracy reasonable under *Matsushita* because its goals were in fact achieved).

Nor are we persuaded by Kodak's contention that it is entitled to a legal presumption on the lack of market power because, as in *Matsushita*, there is a significant risk of deterring procompetitive conduct. Plaintiffs in *Matsushita* attempted to prove the antitrust conspiracy "through evidence of rebates and other price-cutting activities." *Id.*, at 594. Because cutting prices to increase business is "the very essence of competition," the Court was concerned that mistaken inferences would be "especially costly," and would "chill the very conduct the antitrust laws are designed to protect." *Ibid.* See also *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763 (1984) (permitting inference of concerted action would "deter or penalize perfectly legitimate conduct"). But the facts in this case are just the opposite. The alleged conduct -- higher service prices and market foreclosure -- is facially anticompetitive and exactly the harm that antitrust laws aim to prevent. In this situation, *Matsushita* does not create any presumption in favor of summary judgment for the defendant.

Kodak contends that, despite the appearance of anti-competitiveness, its behavior actually favors competition because its ability to pursue innovative marketing plans will allow it to compete more effectively in the equipment market. Brief for Petitioner 40-41. A pricing strategy based on lower equipment prices and higher aftermarket prices could enhance equipment sales by making it easier for the buyer to finance the initial purchase.[26] It is undisputed that competition is enhanced when a firm is able to offer various marketing options, including bundling of support and

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[26] It bears repeating that in this case Kodak has never claimed that it is in fact pursuing such a pricing strategy.

maintenance service with the sale of equipment. Nor do such actions run afoul of the antitrust laws.[27] But the procompetitive effect of the specific conduct challenged here, eliminating all consumer parts and service options, is far less clear.[28]

We need not decide whether Kodak's behavior has any procompetitive effects and, if so, whether they outweigh the anticompetitive effects. We note only that Kodak's service and parts policy is simply not one that appears always or almost always to enhance competition, and therefore to warrant a legal presumption without any evidence of its actual economic impact. In this case, when we weigh the risk of deterring procompetitive behavior by proceeding to trial against the risk that illegal behavior go unpunished, the balance tips against summary judgment. Cf. *Matsushita*, 475 U.S., at 594-595.

For the foregoing reasons, we hold that Kodak has not met the requirements of Fed. Rule Civ. Proc. 56(c).

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[27] See *Jefferson Parish*, 466 U.S., at 12 ("Buyers often find package sales attractive: a seller's decision to offer such packages can merely be an attempt to compete effectively -- conduct that is entirely consistent with the Sherman Act"). See also Yates & DiResta, Software Support and Hardware Maintenance Practices: Tying Considerations, 8 The Computer Lawyer 17 (1991) (describing various service and parts policies that enhance quality and sales but do not violate the antitrust laws).

[28] Two of the largest consumers of service and parts contend that they are worse off when the equipment manufacturer also controls service and parts. See Brief for State Farm Mutual Automobile Insurance Company et al. as *Amici Curiae*; Brief for State of Ohio et al. as *Amici Curiae*.

We therefore affirm the denial of summary judgment on respondents' § 1 claim.[29]

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[29] The dissent urges a radical departure in this Court's antitrust law. It argues that because Kodak has only an "inherent" monopoly in parts for its equipment, *post*, at 4, the antitrust laws do not apply to its efforts to expand that power into other markets. The dissent's proposal to grant *per se* immunity to manufacturers competing in the service market would exempt a vast and growing sector of the economy from antitrust laws. Leaving aside the question whether the Court has the authority to make such a policy decision, there is no support for it in our jurisprudence or the evidence in this case.

Even assuming, despite the absence of any proof from the dissent, that all manufacturers possess some inherent market power in the parts market, it is not clear why that should immunize them from the antitrust laws in another market. The Court has held many times that power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if "a seller exploits his dominant position in one market to expand his empire into the next." *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 611 (1953); see *e.g.*, *Northern Pacific R. Co. v. United States*, 356 U.S. 1 (1958); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *Leitch Mfg. Co. v. Barber Co.*, 302 U.S. 458, 463 (1938). Moreover, on the occasions when the Court has considered tying in derivative aftermarkets by manufacturers, it has not adopted any exception to the usual antitrust analysis, treating derivative aftermarkets as it has every other separate market. See *International Salt Co. v. United States*, 332 U.S. 392 (1947); *International Business Machines Corp. v. United States*, 298 U.S. 131 (1936); *United Shoe Machinery Co. v. United States*, 258 U.S. 451 (1922). Our past decisions are reason enough to reject the dissent's proposal. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done").

Nor does the record in this case support the dissent's proposed exemption for aftermarkets. The dissent urges its exemption because the tie here "does not permit the manufacturer to project power over a class

(continued...)

III

Respondents also claim that they have presented genuine issues for trial as to whether Kodak has monopolized or attempted to monopolize the service and parts markets in violation of § 2 of the Sherman Act. "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. at 570-571.

A

The existence of the first element, possession of monopoly power, is easily resolved. As has been noted,

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[29](...continued)
of consumers distinct from that which it is already able to exploit (and fully) without the inconvenience of the tie." *Post*, at 13-14. Beyond the dissent's obvious difficulty in explaining why Kodak would adopt this expensive tying policy if it could achieve the same profits more conveniently through some other means, respondents offer an alterative theory, supported by the record, that suggests Kodak *is* able to exploit some customers who in the absence of the tie would be protected from increases in parts prices by knowledgeable customers. See *supra*, at 22-23.

At bottom, whatever the ultimate merits of the dissent's theory, at this point it is mere conjecture. Neither Kodak nor the dissent have provided any evidence refuting respondents' theory of forced unwanted purchases at higher prices and price discrimination. While it may be, as the dissent predicts, that the equipment market will prevent any harms to consumers in the aftermarkets, the dissent never makes plain why the Court should accept that theory on faith rather than requiring the usual evidence needed to win a summary judgment motion.

respondents have presented a triable claim that service and parts are separate markets, and that Kodak has the "power to control prices or exclude competition" in service and parts. *du Pont*, 351 U.S., at 391. Monopoly power under § 2 requires, of course, something greater than market power under § 1. See *Fortner*, 394 U.S., at 502. Respondents' evidence that Kodak controls nearly 100% of the parts market and 80% to 95% of the service market, with no readily available substitutes, is, however, sufficient to survive summary judgment under the more stringent monopoly standard of § 2. See *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 112 (1984). Cf. *United States v. Grinnell Corp.*, 384 U.S., at 571 (87% of the market is a monopoly); *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946) (over 2/3 of the market is a monopoly).

Kodak also contends that, as a matter of law, a single brand of a product or service can never be a relevant market under the Sherman Act. We disagree. The relevant market for antitrust purposes is determined by the choices available to Kodak equipment owners. See *Jefferson Parish*, 466 U.S., at 19. Because service and parts for Kodak equipment are not interchangeable with other manufacturers' service and parts, the relevant market from the Kodak-equipment owner's perspective is composed of only those companies that service Kodak machines. See *du Pont*, 351 U.S., at 404 (the "market is composed of products that have reasonable interchangeability").[30] This

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[30] Kodak erroneously contends that this Court in *du Pont* rejected the notion that a relevant market could be limited to one brand. Brief for Petitioner 33. The Court simply held in *du Pont* that one brand does

(continued...)

Court's prior cases support the proposition that in some instances one brand of a product can constitute a separate market. See *National Collegiate Athletic Assn.*, 468 U.S., at 101-102, 111-112 (1984); *International Boxing Club of New York, Inc. v. United States*, 358 U.S. 242, 249-252 (1959); *International Business Machines Corp. v. United States*, 298 U.S. 131 (1936).[31] The proper market definition in this case can be determined only after a factual inquiry into the "commercial realities" faced by consumers. *United States v. Grinnell Corp.*, 384 U.S., at 572.

B

The second element of a § 2 claim is the use of monopoly power "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *United States v. Griffith*, 334 U.S. 100, 107 (1948). If Kodak adopted its parts and service policies as part of a scheme of willful acquisition or maintenance of monopoly power, it will have violated § 2. *Grinnell Corp.*, 384 U.S., at 570-

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[30](...continued)
not *necessarily* constitute a relevant market is substitutes are available. 351 U.S., at 393. See also *Boxing Club*, 358 U.S., at 249-250. Here respondents contend there are no substitutes.

[31] Other courts have limited the market to parts for a particular brand of equipment. See *e.g.*, *International Logistics Group, Ltd. v. Chrysler Corp.*, 884 F.2d 904, 905, 908 (CA6 1989) (parts for Chrysler cars is the relevant market), cert. denied, 494 U.S. 1066 (1990); *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1480-1481, n. 3 (CA9 1986), modified, 810 F.2d 1517 (1987) (service for Bell & Howell equipment is the relevant market); *In re General Motors Corp.*, 99 F.T.C. 464, 554, 584 (1982) (crash parts for General Motors cars is the relevant market; *Heatransfer Corp. v. Volkswagenwerk A.G.*, 553 F.2d 964 (CA5 1977), cert. denied, 434 U.S. 1087 (1978) (air conditioners for Volkswagens is the relevant market).

571; *United States v. Aluminum Co. of America*, 148 F.2d 416, 432 (CA2 1945); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600-605 (1985).[32]

As recounted at length above, respondents have presented evidence that Kodak took exclusionary action to maintain its parts monopoly and used its control over parts to strengthen its monopoly share of the Kodak service market. Liability turns, then, on whether "valid business reasons" can explain Kodak's actions. *Aspen Skiing Co.*, 472 U.S., at 605; *United States v. Aluminum Co. of America*, 148 F.2d, at 432. Kodak contends that it has three valid business justifications for its actions: "(1) to promote interbrand equipment competition by allowing Kodak to stress the quality of its service; (2) to improve asset management by reducing Kodak's inventory costs; and (3) to prevent ISOs from free riding on Kodak's capital investment in equipment, parts and service." Brief for Petitioner 6. Factual questions exist, however, about the validity and sufficiency of each claimed justification, making summary judgment inappropriate.

Kodak first asserts that by preventing customers from using ISOs, "it [can] best maintain high quality service for its sophisticated equipment" and avoid being "blamed for an equipment malfunction, even if the problem is the result of improper diagnosis, maintenance or repair by an ISO." *Id.*, at 6-7. Respondents have offered evidence that ISOs provide quality service and are preferred by some

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[32] It is true that as a general matter a firm can refuse to deal with its competitors. But such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602-605 (1985).

Kodak equipment owners. This is sufficient to raise a genuine issue of fact. See *International Business Machines Corp. v. United States*, 298 U.S., at 139-140 (rejecting IBM's claim that it had to control the cards used in its machines to avoid "injury to the reputation of the machines and the good will of" IBM in the absence of proof that other companies could not make quality cards); *International Salt Co. v. United States*, 332 U.S. 392, 397-398 (1947) (rejecting International Salt's claim that it had to control the supply of salt to protect its leased machines in the absence of proof that competitors could not supply salt of equal quality).

Moreover, there are other reasons to question Kodak's proffered motive of commitment to quality service; its quality justification appears inconsistent with its thesis that consumers are knowledgeable enough to lifecycle price, and its self-service policy. Kodak claims the exclusive-service contract is warranted because customers would otherwise blame Kodak equipment for breakdowns resulting from inferior ISO service. Thus, Kodak simultaneously claims that its customers are sophisticated enough to make complex and subtle lifecycle-pricing decisions, and yet too obtuse to distinguish which breakdowns are due to bad equipment and which are due to bad service. Kodak has failed to offer any reason why informational sophistication should be present in one circumstance and absent in the other. In addition, because self-service customers are just as likely as others to blame Kodak equipment for breakdowns resulting from (their own) inferior service, Kodak's willingness to allow self-service casts doubt on its quality claim. In sum, we agree with the Court of Appeals that respondents "have presented evidence from which a

reasonable trier of fact could conclude that Kodak's first reason is pretextual." 903 F.2d, at 618.

There is also a triable issue of fact on Kodak's second justification -- controlling inventory costs. As respondents argue, Kodak's actions appear inconsistent with any need to control inventory costs. Presumably, the inventory of parts needed to repair Kodak machines turns only on breakdown rates, and those rates should be the same whether Kodak or ISOs perform the repair. More importantly, the justification fails to explain respondents' evidence that Kodak forced OEMs, equipment owners, and parts brokers not to sell parts to ISOs, actions that would have no effect on Kodak's inventory costs.

Nor does Kodak's final justification entitle it to summary judgment on respondents' § 2 claim. Kodak claims that its policies prevent ISOs from "exploit[ing] the investment Kodak has made in product development, manufacturing and equipment sales in order to take away Kodak's service revenues." Brief for Petitioner 7-8. Kodak does not dispute that respondents invest substantially in the service market, with training of repair workers and investment in parts inventory. Instead, according to Kodak, the ISOs are free-riding because they have failed to enter the equipment and parts markets. This understanding of free-riding has no support in our case law.[33] To the contrary, as

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[33] Kodak claims that both *Continental T.V.* and *Monsanto* support its free-rider argument. Neither is applicable. In both *Continental T.V.*, 433 U.S., at 55, and *Monsanto*, 465 U.S., at 762-763, the Court accepted free-riding as a justification because without restrictions a manufacturer would not be able to induce competent and aggressive retailers to make the kind of investment of capital and labor necessary

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the Court of Appeals noted, one of the evils proscribed by the antitrust laws is the creation of entry barriers to potential competitors by requiring them to enter two markets simultaneously. *Jefferson Parish*, 466 U.S., at 14; *Fortner*, 394 U.S., at 509.

None of Kodak's asserted business justifications, then, are sufficient to prove that Kodak is "entitled to a judgment as a matter of law" on respondents' § 2 claim. Fed. Rule. Civ. Proc. 56(c).

IV

In the end, of course, Kodak's arguments may prove to be correct. It may be that its parts, service, and equipment are components of one unified market, or that the equipment market does discipline the aftermarkets so that all three are priced competitively overall, or that any anticompetitive effects of Kodak's behavior are outweighed by its competitive effects. But we cannot reach these conclusions as a matter of law on a record this sparse. Accordingly, the judgment of the Court of Appeals denying summary judgment is affirmed.

It is so ordered.

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[33](...continued)
to distribute the product. In *Continental T.V.* the relevant market level was retail sale of televisions and in *Monsanto* retail sales of herbicides. Some retailers were investing in those markets; others were not, relying, instead, on the investment of the other retailers. To be applicable to this case, the ISOs would have to be relying on Kodak's investment in the service market; that, however, is not Kodak's argument.

JUSTICE SCALIA, with whom JUSTICE O'CONNOR and JUSTICE THOMAS join, dissenting.

This is not, as the Court describes it, just "another case that concerns the standard for summary judgment in an antitrust controversy." *Ante*, at 1. Rather, the case presents a very narrow -- but extremely important -- question of substantive antitrust law: Whether, for purposes of applying our *per se* rule condemning "ties," and for purposes of applying our exacting rules governing the behavior of would-be monopolists,a manufacturer's conceded lack of power in the interbrand market for its equipment is somehow consistent with its possession of "market," or even "monopoly," power in wholly derivative aftermarkets for that equipment. In my view, the Court supplies an erroneous answer to this question,and I dissent.

I

Per se rules of antitrust illegality are reserved for those situations where logic and experience show that the risk of injury to competition from the defendant's behavior is so pronounced that it is needless and wasteful to conduct the usual judicial inquiry into the balance between the behavior's procompetitive benefits and its anticompetitive costs. See, *e. g.*, *Arizona v. Maricopa County Medical Society*, 457 U. S. 332, 350-351 (1982). "The character of the restraint produced by [behavior to which a *per se* rule applies] is considered a sufficient basis for presuming unreasonableness without the necessity of any analysis of the market context in which the [behavior] may be found." *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U. S. 2, 9 (1984). The *per se* rule against tying is just such a rule: Where the conditions precedent to application of the rule are met, *i.e.*, where the tying arrangement is backed

up by the defendant's market power in the "tying" product, the arrangement is adjudged in violation of § 1 of the Sherman Act, 15 U. S. C. §1, without *any* inquiry into the practice's actual effect on competition and consumer welfare. But see *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545, 560 (ED Pa. 1960), aff'd *per curiam*, 365 U.S. 567 (1961) (accepting affirmative defense to *per se* tying allegation).

Despite intense criticism of the tying doctrine in academic circles, see, *e.g.*, R. Bork, The Antitrust Paradox 365-381 (1978), the stated rationale for our *per se* rule has varied little over the years. When the defendant has genuine "market power" in the tying product -- the power to raise price by reducing output -- the tie potentially enables him to extend that power into a second distinct market, enhancing barriers to entry in each. In addition:

> "Tying arrangements may be used to evade price control in the tying product through clandestine transfer of the profit to the tied product; they may be used as a counting device to effect price discrimination; and they may be used to force a full line of products on the customer so as to extract more easily from him a monopoly return on one unique product in the line." *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 513-514 (1969) (*Fortner I*) (WHITE, J., dissenting) (footnotes omitted).

For these reasons, as we explained in *Jefferson Parish*, "the law draws a distinction between the exploitation of market power by merely enhancing the price of the tying product,

on the one hand, and by attempting to impose restraints on competition in the market for a tied product, on the other." 466 U. S., at 14.

Our Section 2 monopolization doctrines are similarly directed to discrete situations in which a defendant's possession of substantial market power, combined with his exclusionary or anticompetitive behavior, threatens to defeat or forestall the corrective forces of competition and thereby sustain or extend the defendant's agglomeration of power. See *United States v. Grinnell Corp.*, 384 U. S. 563, 570-571 (1966). Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws -- or that might even be viewed as procompetitive -- can take on exclusionary connotations when practiced by a monopolist. 3 P. Areeda & D. Turner, Antitrust Law ¶ 813, pp. 300-302 (1978) (hereinafter 3 Areeda & Turner).

The concerns, however, that have led the courts to heightened scrutiny both of the "exclusionary conduct" practiced by a monopolist and of tying arrangements subject to *per se* prohibition, are completely without force when the participants lack market power. As to the former, "[t]he [very] definition of exclusionary conduct," as practiced by a monopolist, ". . . [is] predicated on the existence of substantial market power." *Id.*, at ¶ 813, p. 301 (1978); see, *e. g.*, *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U. S. 172, 177-178 (1965) (fraudulent patent procurement); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 75 (1911) (acquisition of competitors); 3 Areeda and Turner ¶ 724, at 195-197 (vertical integration). And with respect to tying, we have

recognized that bundling arrangements not coerced by the heavy hand of market power can serve the procompetitive functions of facilitating new entry into certain markets, see, *e.g., Brown Shoe Co. v. United States,* 370 U.S. 294, 330 (1962), permitting "clandestine price cutting in products which otherwise would have no price competition at all because of fear of retaliation from the few other producers dealing in the market," *Fortner I, supra,* at 514, n. 9 (WHITE, J., dissenting), assuring quality control, see, *e.g., Standard Oil Co. of Cal. v. United States,* 337 U.S. 293, 306 (1949), and, where "the tied and tying products are functionally related, . . . reduc[ing] costs through economies of joint production and distribution." *Fortner I, supra,* at 514, n. 9 (WHITE, J., dissenting). "Accordingly, we have [only] condemned tying arrangements [under the *per se* rule] when the seller has some special ability -- usually called 'market power' -- to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish, supra,* at 13-14.

The Court today finds in the typical manufacturer's inherent power over its own brand of equipment -- over the sale of distinctive repair parts for that equipment, for example -- the sort of "monopoly power" sufficient to bring the sledgehammer of § 2 into play. And, not surprisingly in light of that insight, it readily labels single-brand power over aftermarket products "market power" sufficient to permit an antitrust plaintiff to invoke the *per se* rule against tying. In my opinion, this makes no economic sense. The holding that market power can be found on the present record causes these venerable rules of selective proscription to extend well beyond the point where the reasoning that supports them leaves off. Moreover, because the sort of power condemned by the Court today is possessed by every

manufacturer of durable goods with distinctive parts, the Court's opinion threatens to release a torrent of litigation and a flood of commercial intimidation that will do much more harm than good to enforcement of the antitrust laws and to genuine competition. I shall explain, in Parts II and III, respectively, how neither logic *nor* experience suggests, let alone compels, application of the *per se* tying prohibition and monopolization doctrine to a seller's behavior in its single-brand aftermarkets, when that seller is without power at the interbrand level.

II

On appeal in the Ninth Circuit, respondents, having waived their "rule of reason" claim, were limited to arguing that the record, construed in the light most favorable to them, *Anderson v. Liberty Lobby, Inc.*, 477 U. S. 242, 255 (1986), supported application of the *per se* tying prohibition to Kodak's restrictive parts and service policy. See *Image Technical Services, Inc. v. Eastman Kodak Co.*, 903 F. 2d 612, 615, n. 1 (CA9 1990). As the Court observes, in order to survive Kodak's motion for summary judgment on this claim, respondents bore the burden of proffering evidence on which a reasonable trier of fact could conclude that Kodak possesses power in the market for the alleged "tying" product. See *ante*, at 10; *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S., at 13-14.

A

We must assume, for purposes of deciding this case, that petitioner is without market, much less monopoly, power in the interbrand markets for its micrographics and photocopying equipment. See *ante*, at 11-12, n. 10; *Oklahoma City v. Tuttle*, 471 U. S. 808, 816 (1985). In the District Court, respondents did in fact, include in their

complaint an allegation which posited the interbrand equipment markets as the relevant markets; in particular, they alleged a § 1 "tie" of micrographics and photocopying equipment to the parts and service for those machines. 1 App. 22-23. Though this allegation was apparently abandoned in pursuit of § 1 and § 2 claims focused exclusively on the parts and service aftermarkets (about which more later), I think it helpful to analyze how that claim would have fared under the *per se* rule.

Had Kodak -- from the date of its entry into the micro-graphics and photocopying equipment markets -- included a lifetime parts and service warranty with all original equipment, or required consumers to purchase a lifetime parts and service contract with each machine, that bundling of equipment, parts and service would no doubt constitute a tie under the tests enunciated in *Jefferson Parish Hospital Dist. No. 2 v. Hyde, supra*. Nevertheless, it would be immune from *per se* scrutiny under the antitrust laws because the *tying* product would be *equipment*, a market in which (we assume) Kodak has no power to influence price or quantity. See *Jefferson Parish, supra*, at 13-14; *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 620 (1977) (*Fortner II*); *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 6-7 (1958). The same result would obtain, I think, had Kodak -- from the date of its market entry -- consistently pursued an announced policy of limiting parts sales in the manner alleged in this case, so that customers bought with the knowledge that aftermarket support could be obtained only from Kodak. The foreclosure of respondents from the business of servicing Kodak's micrographics and photocopying machines in these illustrations would be undeniably complete -- as complete as the foreclosure described in respondents'

complaint. Nonetheless, we would inquire no further than to ask whether Kodak's *market power* in the equipment market effectively forced consumers to purchase Kodak micrographics or photocopying machines subject to the company's restrictive aftermarket practices. If not, that would end the case insofar as the *per se* rule was concerned. See *Jefferson Parish, supra*, at 13-14; 9 P. Areeda, Antitrust Law ¶ 1709c5, pp. 101-102 (1991); Klein & Saft. The Law and Economics of Franchise Tying Contracts, 28 J. Law & Econ. 345, 356 (1985). The evils against which the tying prohibition is directed would simply not be presented. Interbrand competition would render Kodak powerless to gain economic power over an additional class of consumers, to price discriminate by charging each customer a "system" price equal to the system's economic value to that customer, or to raise barriers to entry in the interbrand equipment markets. See 3 Areeda and Turner ¶ 829d, at 331-332.

I have described these illustrations as hypothetical, but in fact they are not far removed from this case. The record below is consistent -- in large part -- with just this sort of bundling of equipment on the one hand, with parts and service on the other. The restrictive parts policy, with respect to micrographics equipment at least, was not even alleged to be anything but prospective. See 1 App. 17. As respondents summarized their factual proffer below:

> "Under this policy, Kodak cut off parts on new products to Kodak micrographics ISOs. The effect of this, of course, was that as customers of Kodak micrographics ISOs obtained new equipment, the ISOs were unable to service the equipment for that

> customer, and, service for these customers was lost by the Kodak ISOs. Additionally, as equipment became obsolete, and the equipment population became all "new equipment" (post April 1985 models), Kodak micrographics ISOs would be able to service no equipment at all." 2 *id.*, at 360.

As to Kodak copiers, Kodak's restrictive parts policy had a broader foundation: Considered in the light most favorable to respondents, see *Anderson, supra*, at 255, the record suggests that, from its inception, the policy was applied to new and existing copier customers alike. But at least all post-1985 purchasers of micrographics equipment, like all post-1985 purchasers of new Kodak copiers, could have been aware of Kodak's parts practices. The only thing lacking to bring all of these purchasers (accounting for the vast bulk of the commerce at issue here) squarely within the hypotheticals we have described is concrete evidence that the restrictive parts policy was announced or generally known. Thus, under the Court's approach the existence *vel non* of such evidence is determinative of the legal standard (the *per se* rule versus the rule of reason) under which the alleged tie is examined. In my judgment, this makes no sense. It is quite simply anomalous that a manufacturer functioning in a competitive equipment market should be exempt from the *per se* rule when it bundles equipment with parts-and-service, but not when it bundles parts with service. This vast difference in the treatment of what will ordinarily be economically similar phenomena is alone enough to call today's decision into question.

B

In the Court of Appeals, respondents sought to sidestep the impediment posed by interbrand competition to their invocation of the *per se* tying rule by zeroing in on the parts and service "aftermarkets" for Kodak equipment. By alleging a tie of *parts* to service, rather than of *equipment* to parts-and-service, they identified a tying product in which Kodak unquestionably held a near-monopoly share: the parts uniquely associated with Kodak's brand of machines. See *Jefferson Parish*, 466 U. S., at 17. The Court today holds that such a facial showing of market share in a single-brand aftermarket is sufficient to invoke the *per se* rule. The existence of even vibrant interbrand competition is no defense. See *ante*, at 17-18.

I find this a curious form of market power on which to premise the application of a *per se* proscription. It is enjoyed by virtually every manufacturer of durable goods requiring aftermarket support with unique, or relatively unique, goods. See P. Areeda & H. Hovenkamp, Antitrust Law ¶ 525.1, p. 563 (Supp. 1991). "[S]uch reasoning makes every maker of unique parts for its own product a holder of market power *no matter how unimportant its product might be in the market.*" *Ibid.* (emphasis added).[1]

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[1] That there exist innumerable parts and service firms in such industries as the automobile industry, see Brief for Automotive Warehouse Distributors Assn., et al., as *Amici Curiae* 2-3, does not detract from this point. The question whether power to control an aftermarket exists is quite distinct from the question whether the power has been exercised. Manufacturers in some markets have no doubt determined that exclusionary intrabrand conduct works to their disadvantage at the competitive interbrand level, but this in no way refutes the self-evident reality that control over unique replacement

(continued...)

Under the Court's analysis, the *per se* rule may now be applied to single-brand ties effected by the most insignificant players in fully competitive interbrand markets, as long as the arrangement forecloses aftermarket competitors from more than a *de minimis* amount of business. *Fortner I*, 394 U. S., at 501. This seems to me quite wrong. A tying arrangement "forced" through the exercise of such power no more implicates the leveraging and price discrimination concerns behind the *per se* tying prohibition than does a tie of the foremarket brand to its aftermarket derivatives, which -- as I have explained --would not be subject to *per se* condemnation.[2] As implemented, the Kodak arrangement

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[1](...continued)
parts for single-branded goods is ordinarily available to such manufacturers for the taking. It confounds sound analysis to suggest, as respondents do, see Brief for Respondents 5, 37, that the asserted fact that Kodak manufactures only 10% of its replacement parts, and purchases the rest from original equipment manufacturers, casts doubt on Kodak's possession of an inherent advantage in the aftermarkets. It does no such thing, any more than Kodak's contracting with others for the manufacture of all constituent parts included in its original equipment would alone suggest that Kodak lacks power in the *interbrand* micrographics and photocopying equipment markets. The suggestion implicit in respondents' analysis -- that if a seller chooses to contract for the manufacture of its branded merchandise, it must permit the contractors to compete in the sale of that merchandise -- is plainly unprecedented.

[2] Even *with* interbrand power, I may observe, it is unlikely that Kodak could have incrementally exploited its position through the tie of parts to service alleged here. Most of the "service" at issue is inherently associated with the parts, *i.e.*, that service involved in incorporating the parts into Kodak equipment, and the two items tend to be demanded by customers in fixed proportions (one part with one
(continued...)

challenged in this case may have implicated truth-in-advertising or other consumer protection concerns, but those concerns do not alone suggest an antitrust prohibition. See *e.g., Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468 (CA3 1992)(en banc).

In the absence of interbrand power, a seller's predominant or monopoly share of its single-brand derivative markets does not connote the power to raise derivative market prices *generally* by reducing quantity. As Kodak and its principal *amicus*, the United States, point out, a rational consumer considering the purchase of Kodak equipment will inevitably factor into his purchasing decision the expected cost of aftermarket support. "[B]oth the price of the equipment and the price of parts and service over the life of the equipment are expenditures that are necessary to obtain copying and micrographic services." Brief for United States as *Amicus Curiae* 13. If Kodak set generally

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[2](...continued)
unit of service necessary to install the part). When that situation obtains, "no revenue can be derived from setting a higher price for the tied product which could not have been made by setting the optimum price for the tying product." P. Areeda & L. Kaplow, Antitrust Analysis ¶ 426(a), p. 705 (4th ed. 1988) (quoting Bowman, Tying Arrangements and the Leverage Problem, 67 Yale L. J. 19 (1957)). These observations strongly suggest that Kodak parts and the service involved in installing them should not be treated as distinct products for antitrust tying purposes. See *Jefferson Parish*, 466 U. S. 2, 39 (O'CONNOR, J., concurring in judgment) ("For products to be treated as distinct, the tied product must, at a minimum, be one that some consumers might wish to purchase separately *without also purchasing the tying product*") (emphasis in original) (footnote omitted); Ross, The Single Product Issue in Antitrust Tying: A Functional Approach, 23 Emory L. J. 963, 1009-1010 (1974).

supracompetitive prices for either spare parts or repair services without making an offsetting reduction in the price of its machines, rational consumers would simply turn to Kodak's competitors for photocopying and micrographic systems. See, *e. g., Grappone, Inc. v. Subaru of New England, Inc.*, 858 F. 2d 792, 796-798 (CA1 1988). True, there are -- as the Court notes, see *ante*, at 21 -- the occasional irrational consumers that consider only the hardware cost at the time of purchase (a category that regrettably includes the Federal Government, whose "purchasing system," we are told, assigns foremarket purchases and aftermarket purchases to different entities). But we have never before premised the application of antitrust doctrine on the lowest common denominator of consumer.

The Court attempts to counter this theoretical point with theory of its own. It says that there are "information costs" -- the costs and inconvenience to the consumer of acquiring and processing life-cycle pricing data for Kodak machines -- that "could create a less responsive connection between service and parts prices and equipment sales." *Ante*, at 19. But this truism about the functioning of markets for sophisticated equipment cannot create "market power" of concern to the antitrust laws where otherwise there is none. "Information costs," or, more accurately, gaps in the availability and quality of consumer information, pervade real-world markets; and because consumers generally make do with "rough cut" judgments about price in such circumstances, in virtually any market there are zones within which otherwise competitive suppliers may overprice their products without losing appreciable market share. We have never suggested that the principal players in a market with such commonplace informational deficiencies (and, thus, bands of apparent consumer pricing

indifference) exercise market power in any sense relevant to the antitrust laws. "While [such] factors may generate 'market power' in some abstract sense, they do not generate the kind of market power that justifies condemnation of tying." *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U. S., at 27; see *e.g., Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp., supra.*

Respondents suggest that, even if the existence of interbrand competition prevents Kodak from raising prices *generally* in its single-brand aftermarkets, there remain certain consumers who are necessarily subject to abusive Kodak pricing behavior by reason of their being "locked in" to their investments in Kodak machines. The Court agrees; indeed, it goes further by suggesting that even a *general* policy of supracompetitive aftermarket prices might be profitable over the long run because of the "lock-in" phenomenon. "[A] seller profitably could maintain supracompetitive prices in the aftermarket," the Court explains, "if the switching costs were high relative to the increase in service prices, and the number of locked-in customers were high relative to the number of new purchasers." *Ante*, at 23. In speculating about this latter possibility, the Court is essentially repudiating the assumption on which we are bound to decide this case, *viz.*, Kodak's lack of any power whatsoever in the interbrand market. If Kodak's *general* increase in aftermarket prices were to bring the total "system" price above competitive levels in the interbrand market, Kodak would be wholly unable to make further foremarket sales -- and would find itself exploiting an ever-dwindling aftermarket, as those Kodak micrographic and photocopying machines already in circulation passed into disuse.

The Court's narrower point, however, is undeniably true. There will be consumers who, because of their capital investment in Kodak equipment, "will tolerate some level of service-price increases before changing equipment brands," *ante*, at 23; this is *necessarily* true for "every maker of unique parts for its own product." Areeda & Hovenkamp, Antitrust Law ¶ 525.1b, at 563. But this "circumstantial" leverage created by consumer investment regularly crops up in smoothly functioning, even perfectly competitive, markets, and in most -- if not all -- of its manifestations, it is of no concern to the antitrust laws. The leverage held by the manufacture of a malfunctioning refrigerator (which is measured by the consumer's reluctance to walk away from his initial investment in that device) is no different in kind or degree from the leverage held by the swimming pool contractor when he discovers a 5-ton boulder in his customer's backyard and demands an additional sum of money to remove it; or the leverage held by an airplane manufacturer over an airline that has "standardized" its fleet around the manufacturer's models; or the leverage held by a drill press manufacturer whose customers have built their production lines around the manufacturer's particular style of drill press; the leverage held by an insurance company over its independent sales force that has invested in company-specific paraphernalia; or the leverage held by a mobile home park owner over his tenants, who are unable to transfer their homes to a different park except at great expense, see generally *Yee v. Escondido*, 503 U. S. __ (1992). Leverage, in the form of *circumstantial* power, plays a role in each of these relationships; but in none of them is the leverage attributable to the dominant party's *market* power in any relevant sense. Though that power can plainly work to the injury of certain

consumers, it produces only "a brief perturbation in competitive conditions -- not the sort of thing the antitrust laws do or should worry about." *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F. 2d 228, 236 (CA7 1988)(Posner, J., dissenting).

The Court correctly observes that the antitrust laws do not permit even a *natural* monopolist to project its monopoly power into another market, *i.e.*, to " 'exploi[t] his dominant position in one market to expand his empire into the next.' " *Ante*, at 27, n. 29 (quoting *Times-Picayune Publishing Co. v. United States*, 345 U. S. 594, 611 (1953)). However when a manufacture uses its control over single-branded parts to acquire influence in single-branded service, the monopoly "leverage" is almost invariably of no practical consequence, because of perfect identity between the consumers in each of the subject aftermarkets (those who need replacement parts for Kodak equipment, and those who need servicing of Kodak equipment). When that condition exists, the tie does not permit the manufacturer to project power over a class of consumers distinct from that which it is already able to exploit (and fully) without the inconvenience of the tie. Cf., *e. g.*, Bowman, Tying Arrangements and the Leverage Problem, 67 Yale L. J. 19, 21-27 (1957).

We have never before accepted the thesis the Court today embraces: that a seller's inherent control over the unique parts for its own brand amounts to "market power" of a character sufficient to permit invocation of the *per se* rule against tying. As the Court observes, *ante*, at 27, n. 29, we have applied the *per se* rule to manufacturer ties of *foremar*ket equipment to aftermarket derivatives -- but only when the manufacturer's monopoly power in the equipment,

coupled with the use of derivative sales as "counting devices" to measure the intensity of customer equipment usage, enabled the manufacturer to engage in price discrimination, and thereby more fully exploit its interbrand power. See *International Salt Co. v. United States*, 332 U. S. 392 (1947); *International Business Machines Corp. v. United States*, 298 U. S. 131 (1936); *United Shoe Machinery Corp. v. United States*, 258 U. S. 451 (1922). That sort of enduring opportunity to engage in price discrimination is unavailable to a manufacturer -- like Kodak -- that lacks power at the interbrand level. A tie between two aftermarket derivatives does next to nothing to improve a competitive manufacturer's ability to extract monopoly rents from its consumers.[3]

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[3] The Court insists that the record in this case suggests otherwise, *i.e.*, that a tie between parts and service somehow *does* enable Kodak to increase overall monopoly profits. See *ante*, at 27, n. 29. Although the Court does not identify the record evidence on which it relies, the suggestion, apparently, is that such a tie facilitates price discrimination between sophisticated, "high-volume" users of Kodak equipment and their unsophisticated counterparts. The sophisticated users (who, the Court presumes, invariably self-service their equipment) are permitted to buy Kodak parts without also purchasing supracompetitively-priced Kodak service, while the unsophisticated are -- through the imposition of the tie -- compelled to buy both. See *ante*, at 22-23.

While superficially appealing, at bottom this explanation lacks coherence. Whether they self-service their equipment or not, rational foremarket consumers (those consumers who are not yet "locked in" to Kodak hardware) will be driven to Kodak's competitors if the price of Kodak equipment, together with the expected cost of aftermarket support, exceeds competitive levels. This will be true no matter how Kodak distributes the total system price among equipment, parts, and service. See *supra*, at 10. Thus, as to these consumers, Kodak's lack of interbrand power wholly prevents it from employing a tie between parts and service as a vehicle for price discrimination. Nor does a tie

(continued...)

Nor has any court of appeals (save for the Ninth Circuit panel below) recognized single-branded aftermarket power as a basis for invoking the *per se* tying prohibition. See *Virtual Maintenance, Inc.* v. *Prime Computer, Inc.*, 957 F. 2d 1318, 1328 (CA6 1992) ("Defining the market by customer demand *after* the customer has chosen a single

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[3](...continued)
between parts and service offer Kodak incremental exploitative power over those consumers -- sophisticated or not -- who have the supposed misfortune of being "locked in" to Kodak equipment. If Kodak desired to exploit its circumstantial power over this wretched class by pressing them up to the point where the cost to each consumer of switching equipment brands barely exceeded the cost of retaining Kodak equipment and remaining subject to Kodak's abusive practices, it could plainly do so without the inconvenience of a tie, through supracompetitive parts pricing alone. Since the locked-in *sophisticated* parts purchaser is as helpless as the locked-in *unsophisticated* one. I see nothing to be gained by price discrimination in favor of the former. If such price discrimination were desired, however, it would not have to be accomplished indirectly, through a tie of parts to service. Section 2(a) of the Robinson-Patman Act, 15 U. S. C. § 13(a), would prevent giving lower parts prices to the sophisticated customers only "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ." *Ibid.*; see, *e. g.*, *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U. S. 428, 434-435 (1983). That prohibited effect often occurs when price-discriminated goods are sold for resale (*i.e.*, to purchasers who are necessarily in competition with one another). *E. g.*, *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37, 47 (1948); see P. Areeda & L. Kaplow, Antitrust Analysis ¶ 600, p. 923 (1988) ("Secondary-line injury arises [under the Robinson-Patman Act] when a powerful firm buying supplies at favorable prices thereby gains a decisive advantage over its competitors that are forced to pay higher prices for their supplies"). It rarely occurs where, as would be the case here, the price-discriminated goods are sold to various businesses for consumption.

supplier fails to take into account that the supplier . . . must compete with other similar suppliers to be designated the sole source in the first place"); *Grappone, Inc.* v. *Subaru of New England, Inc.*, 858 F. 2d 792, 798 (CA1 1988) ("[W]e do not see how such dealer investment [in facilities to sell Subaru products] . . . could easily translate into Subaru market power of a kind that, through tying, could ultimately lead to higher than competitive prices for consumers"); *A.I. Root Co.* v. *Computer/Dynamics, Inc.*, 806 F. 2d 673, 675-677, and n. 3 (CA6 1986) (competition at "small business computer" level precluded assertion of computer manufacturer's power over software designed for use only with manufacturer's brand of computer); *General Business Systems* v. *North American Philips Corp.*, 699 F. 2d 965, 977 (CA9 1983) ("To have attempted to impose significant pressure to buy [aftermarket hardware] by use of the tying service only would have hastened the date on which Philips surrendered to its competitors in the small business computer market"). See also *Parts & Elec. Motors, Inc.* v. *Sterling Elec., Inc.*, 866 F. 2d, at 233 (law-of-the-case doctrine compelled finding of market power in replacement parts for single-brand engine).

We have recognized in closely related contexts that the deterrent effect of *inter*brand competition on the exploitation of *intra*brand market power should make courts exceedingly reluctant to apply rules of *per se* illegality to intrabrand restraints. For instance, we have refused to apply a rule of *per se* illegality to vertical nonprice restraints "because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition," *Continental T. V., Inc.* v. *GTE Sylvania, Inc.*, 433 U. S. 36, 51-52 (1977), the latter of which we described as "the primary concern of antitrust law." *Id.*, at

52, n. 19. We noted, for instance, that "new manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer," and that "[e]stablished manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products." *Id.*, at 55. See also *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U. S. 717, 726 (1988). The same assumptions, in my opinion, should govern our analysis of ties alleged to have been "forced" solely through *intra*brand market power. In the absence of interbrand power, a manufacturer's bundling of aftermarket products may serve a multitude of legitimate purposes: It may facilitate manufacturer efforts to ensure that the equipment remains operable and thus protect the seller's business reputation, see *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp., at 560, aff'd *per curiam*, 365 U. S. 567 (1961); it may create the conditions for implicit consumer financing of the acquisition cost of the tying equipment through supracompetitively-priced aftermarket purchases, see, *e.g.*, A. Oxenfeldt, Industrial Pricing and Market Practices 378 (1951); and it may, through the resultant manufacturer control of aftermarket activity, "yield valuable information about component or design weaknesses that will materially contribute to product improvement," 3 Areeda & Turner ¶ 733c, at 258-259; see also *id.* ¶ 829d, at 331-332. Because the interbrand market will generally punish intrabrand restraints that consumers do not find in their interest, we should not -- under the guise of a *per se* rule -- condemn such potentially procompetitive arrangements simply

because of the antitrust defendant's inherent power over the unique parts for its own brand.

I would instead evaluate the aftermarket tie alleged in this case under the rule of reason, where the tie's *actual* anticompetitive effect in the tied product market, together with its potential economic benefits, can be fully captured in the analysis, see, *e.g.*, *Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U. S., at 41 (O'CONNOR, J., concurring in judgment). Disposition of this case does not require such an examination, however, as respondents apparently waived any rule-of-reason claim they may have had in the District Court. I would thus reverse the Ninth Circuit's judgment on the tying claim outright.

III

These considerations apply equally to respondents' § 2 claims. An antitrust defendant lacking relevant "market power" sufficient to permit invocation of the *per se* prohibition against tying a *fortiori* lacks the monopoly power that warrants heightened scrutiny of his allegedly exclusionary behavior. Without even so much as asking whether the purposes of § 2 are implicated here, the Court points to Kodak's control of "100% of the parts market and 80% to 95% of the service market," markets with "no readily available substitutes," *ante*, at 28, and finds that the proffer of such statistics is sufficient to fend off summary judgment. But this showing could easily be made, as I have explained, with respect to virtually any manufacturer of differentiated products requiring aftermarket support. By permitting antitrust plaintiffs to invoke § 2 simply upon the unexceptional demonstration that a manufacturer controls the supplies of its single-branded merchandise, the Court transforms § 2 from a specialized mechanism for respond-

ing to extraordinary agglomerations (or threatened agglomerations) of economic power to an all-purpose remedy against run-of-the-mill business torts.

In my view, if the interbrand market is vibrant, it is simply not necessary to enlist § 2's machinery to police a seller's intrabrand restraints. In such circumstances, the interbrand market functions as an infinitely more efficient and more precise corrective to such behavior, rewarding the seller whose intrabrand restraints enhance consumer welfare while punishing the seller whose control of the aftermarkets is viewed unfavorably by interbrand consumers. See *Business Electronics Corp.*, *supra*, at 725; *Continental T.V., Inc.*, *supra*, at 52, n. 19, 54. Because this case comes to us on the assumption that Kodak is without such interbrand power, I believe we are compelled to reverse the judgment of the Court of Appeals. I respectfully dissent.

DONN P. PICKETT, San Francisco, Calif. (DANIEL M. WALL, ALFRED C. PFEIFFER JR., HOLLY A. HOUSE, McCUTCHEN, DOYLE, BROWN & ENERSEN, and JONATHAN W. ROMEYN, on the briefs) for petitioner; JAMES F. RILL, Assistant Attorney General (KENNETH W. STARR, Sol. Gen., JAMES F. RILL, Asst. Atty. Gen., LAWRENCE G. WALLACE, Dpty. Sol. Gen., CHRISTOPHER J. WRIGHT, Asst. to Sol. Gen., CATHERINE G. O'SULLIVAN, ROBERT B. NICHOLSON, and DAVID SEIDMAN, Justice Dept. attys., on the briefs) for U.S. as amicus curiae supporting petitioner; JAMES A. HENNEFER, San Francisco, Calif. (A. KIRK McKENZIE, DOUGLAS E. ROSENTHAL, JONATHAN M. JACOBSON, ELINOR R. HOFFMANN, DOUGLAS B. RUTZEN, and COUDERT BROS., on the briefs) for respondents.

PROOF OF SERVICE

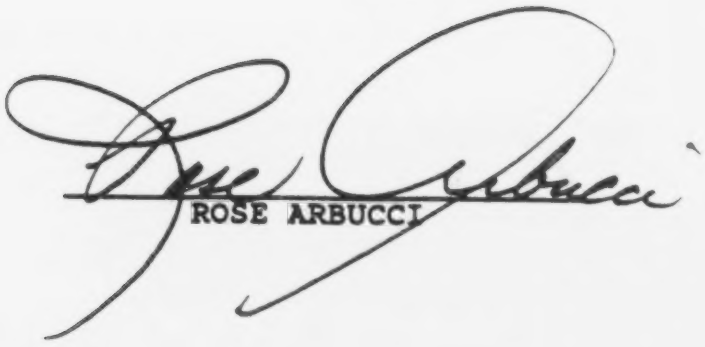
The undersigned certifies that:

I am and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, State of California, over the age of 18 years and not a party to or interested in the within action, and that my business address is 611 West Sixth Street, Suite 2000, Los Angeles, California. I further certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. I had the foregoing document served on the below-listed parties to this action by depositing a copy of same, enclosed in a sealed envelope with first class postage prepaid thereon, in the United States mails at Los Angeles, California on June 18, 1992 addressed as follows:

S. William Livingston, Jr. Esquire
Covington & Burling
1201 Pennsylvania Ave., N.W.
P. O. Box 7566
Washington, D.C. 20044

Stephen G. Sawyer, Esquire
United Airlines, Inc.
1200 East Algonquin Road
Elk Grove Village, Illinois 60007

Robert B. Flaig, Esquire
Stephen E. Ensberg, Esquire
Thelen, Marrin, Johnson & Bridges
333 South Grand Avenue, Suite 3400
Los Angeles, California 90071


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U.S. COURT OF APPEALS

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PACIFIC EXPRESS, INC. Appellant-Petitioner, v. UNITED AIR LINES, INC., Appellee-Respondent.	No. 91-55208 D.C. No. CV-84-5185-ER ORDER

ALARCON, Circuit Judge

The request for leave to file a supplemental memorandum filed June 24, 1992, is denied as moot.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11852 Santa Monica Boulevard, Suite 3, Los Angeles, California 90025; that on October 23, 1992, I served the within *Petition For Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(By Express Mail: Original and Forty Copies)

Clerk, U.S. Court of Appeals
Ninth Judicial Circuit
121 Spear Street
San Francisco, CA 94119

S. William Livingston, Jr., Esquire
Covington & Burling
1201 Pennsylvania Ave., N.W.
P. O. Box 7566
Washington, D. C. 20044

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 23, 1992, at Los Angeles, California.

Betty J. Malloy
(Original Signed)

Supreme Court, U.S.
FILED
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No. 92-723

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

PACIFIC EXPRESS, INC.,
Petitioner,

v.

UNITED AIR LINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR UNITED AIR LINES, INC. IN OPPOSITION

S. WILLIAM LIVINGSTON, JR.*
CAROLYN F. CORWIN
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000
Attorneys for Respondent United Air Lines, Inc.
* Counsel of Record

November 23, 1992

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that petitioner failed to present evidence showing that respondent's expansion of airline service in 1983 resulted in "antitrust injury."

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties. United Air Lines, Inc., is a wholly-owned subsidiary of UAL, Inc.

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IN THE

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BRIEF FOR UNITED AIR LINES, INC. IN OPPOSITION

STATEMENT OF THE CASE

A. Statement of Facts

Petitioner Pacific Express was an airline that operated for about two years, from January 1982 until February 1984. It operated principally on routes connecting relatively small cities on the West Coast with San Francisco and Los Angeles. SER 99, p. A-76.[1]

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[1] "SER" and "ER" refer to the Supplemental Excerpt of Record and the Excerpt of Record filed in the court of appeals. "RT" refers to the Reporter's Transcript filed in the district court.

In the fall of 1983, after months of planning, respondent United Air Lines undertook a general expansion of its operations at San Francisco International Airport, which was a "hub" airport in United's system. ER 111, pp. 3-5. The expansion included three new routes from San Francisco that were also flown by Pacific Express; in addition, the expansion increased the number of flights on various existing United routes, some of which were served by Pacific Express.[2] *Id.* p. 4. United did not introduce fares lower than those of Pacific Express; as Pacific Express' own witnesses conceded, Pacific Express "tended to have the lowest fares in all markets," and United lowered its fares to meet Pacific Express, not the other way around. SER 99, pp. A-114, A-115, A-134, A-135, A-136, A-157.

United continued to serve all of the expansion routes for at least four years, long after the exit of Pacific Express in February 1984. ER 111, p. 5; SER 162. On a number of Pacific Express' old routes United continued to face competition from other carriers. SER 99, pp. A-173, A-174.[3]

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[2] Pacific Express asserts that United scheduled its new flights to match or "sandwich" Pacific Express' flights. Pet. 5. There is nothing in the record to support this claim; the affidavits cited by Pacific Express certainly provide no support. In any event, it is not unlawful for an airline to offer competitive schedules.

[3] The fact that there is only one carrier on a "thin route," as many of Pacific Express' routes were, does not show monopoly power, *i.e.*, power to control price or to exclude competition. See United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956). Although the district court did not find it necessary to rule on the point, United showed below that it had no probability of achieving monopoly power because of the ease with which air carriers can enter each other's routes. ER 94, pp. 5-14. There is also no support for the assertion that United raised fares after Pacific Express went out of business. The evidence on which Pacific Express relies for this assertion is a comparison of Pacific Express' yields in 1983 (4th quarter) with United's yields in 1984, truly an apples to oranges comparison. ER 106, p. 235.

In May 1984, after Pacific Express went bankrupt, United entered into a "feeder" agreement with a small carrier in California, Westair Commuter Airlines. ER-106, Westair Agreement. The agreement by its terms did not prevent the parties from competing with each other. *Id.* § 3, p. 273. In fact, Westair and United both continued to serve some of the same routes. SER 103, p. 4, ¶ 14; SER 99, pp. A-173, A-174.

B. Proceedings Below

1. Pacific Express filed this suit in July 1984, claiming that United attempted to monopolize "various air passenger routes" in violation of Section 2 of the Sherman Act. Complaint, ¶ 12. The complaint also alleged that United's conduct was tortious. *Id.* ¶¶ 20-24.

After extensive discovery, United filed a motion for summary judgment. In its response, Pacific Express took the position that the *only* source of its injury was United's 1983 expansion of service. ER First Opp. Br. p. 36. The alleged injury was that United had "ousted Pacific Express from its natural market monopolies." *Id.* pp. 40-41.

As the district court recognized, Pacific Express presented "no evidence" that the expansion of service "involve[d] any unlawful restraint of trade or any other apparent illegal means." ER RT 11-2-90, p. 5. Pacific Express conceded that "this is not a predatory pricing case" and that the "conduct here is not predatory pricing as that term has been defined." [4] ER First Opp. Br. pp. 15, 38. It also stated that its allegations involving gate space, United's operation of its computerized reservation system, and Pacific Express' unsuccessful attempt to nego-

[4] Pacific Express elaborated on this point by saying that "[t]o characterize what United did as 'predatory pricing' would be to stand the concept on its head. Here, it was Pacific Express who was the dominating factor, in many, if not most, of the markets in which it flew." ER First Opp. Br. p. 37.

tiate a feeder agreement with United were "*not* conduct elements which Pacific Express claims are causally linked to its marketplace demise." *Id.* p. 35 (emphasis in the original). Rather, its claim was that Pacific Express was injured simply because United introduced expanded service on Pacific Express' routes in the fall of 1983.

The district court granted summary judgment on Pacific Express' antitrust claim because United's expansion of airline service could not be the cause of "antitrust injury," which an antitrust plaintiff must show in order to recover damages. ER RT 10-1-90, pp. 6-8. The district court also granted United's motion for summary judgment on the tort claim. ER RT 11-2-90, pp. 4-7.

2. The court of appeals affirmed in a unanimous opinion. Pet. App. A-1 through A-12. Citing this Court's decision in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990), the court of appeals held that there was no evidence of antitrust injury because, "[e]ven assuming that an inference of anti-competitive intent can be drawn," Pacific Express had failed to show "that its injury was caused by anticompetitive or predatory aspects of United's conduct, not by competition." Pet. App. A-7, A-8. While Pacific Express was undoubtedly affected by United's expansion of service on its routes, it "has not shown that its losses were caused by anything other than increased competition." *Id.* at A-9. Because antitrust injury must be "attributable to an anti-competitive aspect of the practice under scrutiny," Pacific Express had failed to prove this essential element of its claim. *Id.* at A-8.

The court of appeals also affirmed the dismissal of the tort claim. Pet. App. A-12.

Pacific Express' petition for a writ of certiorari is limited to its antitrust claim. It has evidently abandoned the tort claim.

REASONS FOR DENYING THE WRIT

The decision below is correct and raises no question that warrants review by this Court. The court of appeals engaged in a straightforward application of the well-settled "antitrust injury" doctrine, which was restated recently by this Court in *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328 (1990). The only injury of which Pacific Express complained in the district court was the loss of business it allegedly suffered as a result of United's expansion of service on routes flown by Pacific Express. The expansion of service in this case represented the offering of more competitive choices to consumers. There was no evidence that the expansion was carried out by illegal means. Indeed, Pacific Express did not even claim that United engaged in predatory pricing or other anticompetitive actions in connection with its expansion. The court of appeals correctly concluded that the antitrust claim should be dismissed because there was no evidence that Pacific Express' alleged injury "was caused by anticompetitive or predatory aspects of United's conduct, [rather than] by competition." Pet. App. A-7, A-8.

This case raises no legal issue of general importance. Clearly there is no need for the Court to address again the "antitrust injury" doctrine, which it so recently reiterated in *Atlantic Richfield.* At most, Pacific Express is complaining about the court of appeals' application of settled law to a specific set of facts. Pacific Express does not even attempt to argue that the decision below conflicts with the decision of any other court of appeals.

The two grounds Pacific Express advances for granting the writ are completely without substance.

I. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THIS COURT'S DECISION IN EASTMAN KODAK

Pacific Express argues (Pet. 7) that the court of appeals adopted "United's proffered business justification

in the face of strong, contrary evidence," in supposed conflict with the summary judgment standard for antitrust cases set forth in *Eastman Kodak Co. v. Image Technical Services, Inc.*, —— U.S. ——, 112 S.Ct. 2072 (1992). There is no such conflict.

The court of appeals did *not* make any ruling about "business justification" in disposing of the antitrust claim. Indeed, it assumed for the sake of argument "that an inference of anti-competitive intent can be drawn" from the circumstances surrounding United's expansion of service. Pet. App. A-7. The antitrust claim was dismissed because there was no evidence showing "antitrust injury," *i.e.*, that the alleged injury was caused by "predatory or anticompetitive conduct" rather than increased competition. *Id.* at A-8, A-9. The assertion that the court of appeals applied an improper summary judgment standard by assessing the "business justification" for the 1983 service expansion is completely wrong.[5]

II. THE COURT OF APPEALS DID NOT HOLD THAT ENTRY CAN NEVER BE PREDATORY

Pacific Express argues that "[t]o the extent that the Ninth Circuit opinion implies that entry cannot be predatory in any circumstance," the court below committed a "major error." Pet. 10. The argument is frivolous. The court of appeals did not hold or imply or even remotely suggest that entry into new markets can never be "predatory in any circumstance." The decision below focused only on United's expansion of service in 1983, and it held only that there was no evidence of any anticompetitive or predatory conduct that caused injury to

[5] In fact, there was unrebutted evidence that the expansion was fully justified in business terms, representing simply a decision by United to offer new services on a number of routes in an attempt to attract more business. Pet. App. C-5, C-6. However, the court of appeals relied on this evidence only in connection with its ruling on the tort claim. See *id.* at A-11.

Pacific Express. The opinion did not purport to deal with other market entries by other companies in other circumstances. It merely applied the "antitrust injury" doctrine to the facts of this case.

Pacific Express also asserts that the court of appeals suggested that conspiracy among competitors is an appropriate method to "survive and prosper," which it says is by itself enough to "warrant[] at least *per curiam* reversal." Pet. 7, 10-11. In fact, the court of appeals said nothing to encourage cartels or conspiracies.[6] It simply noted that United and Pacific Express at one point had attempted to negotiate an arrangement under which Pacific Express would "serve routes not flown by United in order to provide United's long distance flights with passengers." Pet. App. A-8, A-9. Such arrangements clearly are not cartels or anticompetitive. The court's observation that Pacific Express "may have survived and prospered" if the negotiations had succeeded (*id.* at A-9) is an unremarkable comment that played no role in its decision concerning antitrust injury.

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[6] The assertions in the petition (at 10-11) that United "tendered to Pacific Express an agreement to form a cartel," and that United retaliated because Pacific Express refused to "knuckl[e] under to United's demand that it not compete against it" are irrelevant to the court of appeals' antitrust injury analysis and at odds with record evidence. See, *e.g.*, Pet. App. C-4, C-5, C-6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

S. WILLIAM LIVINGSTON, JR.*
CAROLYN F. CORWIN
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000
Attorneys for Respondent
United Air Lines, Inc.

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* Counsel of Record